


1-15-1992

## The Policy against Federal Funding for Abortions Extends into the Realm of Free Speech after Rust v. Sullivan

Loye M. Barton

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Health Law Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Medical Jurisprudence Commons](#), [President/Executive Department Commons](#), and the [Women Commons](#)

---

### Recommended Citation

Loye M. Barton *The Policy against Federal Funding for Abortions Extends into the Realm of Free Speech after Rust v. Sullivan*, 19 Pepp. L. Rev. 2 (1992)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol19/iss2/5>

This Note is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

# The Policy Against Federal Funding For Abortions Extends Into The Realm Of Free Speech After *Rust v. Sullivan*

## I. INTRODUCTION

*"Life often presents us with a choice of evils, rather than of goods."*<sup>1</sup>

Abortion is one of the most divisive issues to confront the American people. It polarizes political platforms, families and communities. The Supreme Court's 1973 decision in *Roe v. Wade*<sup>2</sup> fell far short of putting the abortion issue to rest. To the contrary, the cry to either overturn or uphold *Roe v. Wade* is an element of the abortion debate which continues to grow in volume and tension. *Rust v. Sullivan*<sup>3</sup> added fuel to a heated controversy.

*Rust v. Sullivan* has been referred to as "the most important case of the term."<sup>4</sup> The five-justice majority decision upheld Health and Human Resources regulations that prohibit federally funded family planning clinics from counseling or referring clients for abortion and from lobbying for abortion.<sup>5</sup> It also upheld regulations requiring any abortion-related activities be kept physically separate from activities supported in any part with Title X funds.<sup>6</sup> The penalty for noncompliance is the loss of Title X federal funds.<sup>7</sup>

*Rust v. Sullivan* touches the fundamental right of freedom of ex-

---

1. CHARLES CALEB COLTEN, LACON (quoted in DICTIONARY OF QUOTATIONS 103 (1968)).

2. 410 U.S. 113 (1973).

3. 111 S. Ct. 1759 (1991).

4. *What Will Be the Impact of Rust V. Sullivan?*, 77 A.B.A. J. Aug., 1991 at 32.

5. *Rust v. Sullivan*, 111 S. Ct. at 1772. The Bush Administration on March 20, 1992 announced a modification of the controversial regulations that would allow physicians to give a patient information about abortion. Nurses and counselors are still precluded from providing abortion information. See, e.g., David G. Savage, *U.S. Modifies Abortion-Advice Rules for Clinics*, L.A. TIMES, March 21, 1992, at A1.

6. *Rust v. Sullivan*, 111 S. Ct. at 1772. In 1970, Congress enacted the Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506 (codified at 42 U.S.C. §§ 300-300a-8 (1982)). Title X is the popular name for Subchapter VIII of the Public Health and Welfare laws, and is so designated because it falls under Title X of Chapter 373 of public law no. 91-572. See also *infra* notes 43-57 and accompanying text (describing the new Title X regulations).

7. See *infra* notes 35-75 and accompanying text.

pression and raises questions of privacy, the impact on the doctor-patient relationship, and the extent to which the government may promote a particular viewpoint. To those who oppose abortion, *Rust v. Sullivan* appeared to be a green light to attack the heart of *Roe v. Wade*.<sup>8</sup> Those who support free choice believed that the decision made too large an inroad into *Roe v. Wade*.<sup>9</sup>

This note is divided into five parts. Part II traces the legislative history behind the regulations and summarizes the new regulations. Part III is a background of the constitutional issues presented by the *Rust v. Sullivan* decision, including freedom of speech, unconstitutional conditions, and the right to privacy. Part IV analyzes the Supreme Court's decision. Finally, Part V looks at the impact of the decision on the family planning clinics touched by the decision, the doctors, staff and patients at such clinics, and the impact in the political and legislative arenas. Part VI presents a brief conclusion.

## II. HISTORICAL BACKGROUND

### A. *The Original Title X Regulations*

Congress enacted the Family Planning and Services Population Research Act<sup>10</sup> (the Family Planning Act) in 1970 which added Title X to the Public Health Service Act (the Public Health Act).<sup>11</sup> Title X authorizes the Secretary of Health and Human Services (the Secretary) to make federal grants to both private nonprofit and public entities that provide family planning services.<sup>12</sup> These services may include natural family planning methods, infertility services, and adolescent services,<sup>13</sup> but may not include abortions.<sup>14</sup> Section 1008 of Title X, which is the center of the controversy in *Rust V. Sullivan*,<sup>15</sup> states that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."<sup>16</sup> This phrase was interpreted as meaning that no federal

---

8. Recent legislation in Louisiana is representative of the attack on *Roe v. Wade*. See *infra* notes 383-390 and accompanying text.

9. Both the Senate and House of Representatives passed legislation allowing abortion counseling and referral at family planning clinics receiving Title X federal funds. See discussion at *infra* note 398 and accompanying text.

10. Public Health Service Act, codified at 42 U.S.C. §§ 300-300(1-7) (1982).

11. Family Planning and Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (codified as amended at 42 U.S.C. §§ 300-300a-8 (1982)).

12. The Secretary has the authority "to make grants to and to enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." 42 U.S.C. § 300(a) (1990).

13. *Id.*

14. Public Health Service Act, Pub. L. 91-572, § 1008, 84 Stat. 1508 (codified at 42 U.S.C. § 300a-6 (1970)) [hereinafter section 1008].

15. 111 S. Ct. 1759 (1991).

16. 42 U.S.C. § 300a-6 (1970).

funds could be earmarked for abortion, but did not preclude other funds from being used for abortion services.<sup>17</sup>

Title X was intended to be a comprehensive family planning service. The early guidelines recommended that a pregnant woman receive counseling on all of her options, including abortion.<sup>18</sup> These guidelines were created notwithstanding the express statement of the section 1008 sponsor "that abortion is not to be encouraged or promoted in any way through [Title X] legislation."<sup>19</sup> Subsequently, between 1974 and 1987 members of Congress made at least five attempts to remove abortion counseling from the list of comprehensive services that should be provided to a pregnant woman.<sup>20</sup> All of the legislation either died in committee or was voted down.<sup>21</sup>

Early attempts to remove abortion counseling from Title X programs contradict that part of the legislative record suggesting a con-

17. See *infra* notes 58-60 and accompanying text.

18. Pre-1981 guidelines covered "abortion related activities that were permissible within the section 1008 prohibition." 53 Fed. Reg. 2922-01 (1988)(codified at 42 C.F.R. § 59). The revised guidelines issued in 1981 required that a clinic provide counseling on abortion, among other options, when a woman with an unintended pregnancy inquired about her options. United States Dept. of Health and Human Services Program Guidelines for Project Grants for Family Planning Services 8.6 (1981), available in Appendix to Petitioners Brief for Writ of Certiorari, *Rust v. Sullivan* (Nos. 89-1391, 89-1392). See also Carole I. Chervin, Note, *The Title X Family Planning Gag Rule: Can The Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 405-06 n.21 (1989).

19. 116 CONG. REC. 37,375 (1970) (statement by Rep. Dingell). The only connection that Rep. Dingell saw between family planning and abortion was that "properly operated family planning programs should reduce the incidence of abortion." *Id.* Representative Dingell has since repudiated the now often quoted remark that abortion was not to be promoted or encouraged. C. Andrew McCarthy, *The Prohibition on Abortion Counseling and Referral in Federally-Funded Family Planning Clinics*, 77 CALIF. L. REV. 1181, 1185 n. 28. In a letter to Secretary Otis Brown, Representative Dingell stated that his comments were not intended to imply "that family planning clinics should be prohibited from counseling pregnant women on any matter or referring them to appropriate facilities." *Id.* (citing Letter from Rep. John D. Dingell to HHS Secretary Otis Bowen (Oct. 14, 1987, quoted in Brief for Appellant at app., *Massachusetts v. Bowen*, 873 F.2d 1528 (1st Cir. 1989)).

20. 120 CONG. REC. 21,687-95 (1974); 121 CONG. REC. 20,863-65 (1975); 124 CONG. REC. 37,045 (1978); President's Pro-Life Bill of 1987, S. 1242, 100th Cong., 1st Sess. (1987); Unborn Children's Civil Rights Act, S. 381, 100th Cong., 1st Sess. (1987); Preborn Children's Civil Rights Act of 1987, H.R. 720, 100th Cong. 1st Sess. (1987).

The legislature was more successful with the Adolescent Family Life Act (AFLA). 42 U.S.C. §§ 300z-10 (1982 & Supp. III 1985). This regulation restricts abortion counseling or referral for adolescents. 42 U.S.C. § 300z-10(a). See generally, Janet Benshoof, *The Chastity Act: Government Manipulation Of Abortion Information And The First Amendment*, 101 HARV. L. REV. 1916 (1988) (outlining the AFLA and its first amendment applications and limitations).

21. McCarthy, *supra* note 19, at 1184-85.

cern that family planning choices be made according to the conscience of the individual client.<sup>22</sup> On the other hand, there is no dispute that actual abortions could not be performed or actively promoted using Title X funds.<sup>23</sup>

The original congressional intent as to the application of section 1008 is far from clear.<sup>24</sup> For the past twenty years the consensus was that actually performing an abortion was prohibited by section 1008,<sup>25</sup> as was anything beyond the "mere referral" to a clinic that provided abortions.<sup>26</sup> The Title X recipient application required the applicant to state that they would not use Title X funds to "provide abortions as a method of family planning," and bolstered this interpretation of section 1008.<sup>27</sup>

In 1982, the General Accounting Office (the GAO) issued a report recommending that the Secretary clarify the section 1008 restriction on abortion.<sup>28</sup> The GAO based its recommendation on the GAO's

---

22. See 42 U.S.C. § 300(a)-5. Members of Congress indicated, for example, that Title X should enable "all individuals . . . within the dictates of their conscience, to exert control over their own life destinies." 116 CONG. REC. 24092 (1970). There was also an expressed concern that the religious beliefs of the individual be protected. 116 CONG. REC. 37388 (1970) ("[w]e must be very careful to safeguard the religious and moral convictions of all our citizens").

23. See Memorandum from Office of the General Counsel Dept. of Health, Education and Welfare (April 14, 1978) *available in* Joint Appendix of Petitioners Brief at 54 (Nos. 89-1391, 89-1392). This memorandum states that "the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered proscribed by [section] 1008." *Id.*

24. 53 Fed. Reg. 2922-01. See *Rust v. Sullivan* 111 S. Ct. 1759, 1767 (1991).

25. See e.g., *New York v. Sullivan*, 889 F.2d 401, 405 (2d Cir. 1989) *vacated by Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (stating that "administrative interpretations at first permitted, and later required, Title X projects to provide information about, and referral for, abortions, including names and addresses of 'abortion clinics'"), citing U.S. DEPT OF HEALTH, EDUC. & WELFARE, PROGRAM INCENTIVES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES (Jan. 1976); U.S. DEPT OF HEALTH AND HUMAN SERVICES PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981)). A statement in the conference report accompanying the regulation seems to bear out this intent.

It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family services, population research, infertility services, and other related medical, information and education activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion in order to make clear this intent.

CONF. REP. NO. 91-1667, 97th Cong., 2nd Sess. 8-9 (1970) (emphasis added). *But see* the comments made by Representative Dingell *supra* note 19.

26. *New York v. Sullivan*, 889 F.2d at 405. For instance, activities that "promote or encourage" abortion were proscribed by section 1008, including encouraging abortion or providing transportation for an abortion. Memorandum from Carol C. Conrad, Office of the General Counsel, Dep't of Health, Educ. & Welfare, to Elsie Sullivan, Ass't for Information and Education, Office of Family Planning (April 14, 1978), *quoted in* Brief for the Respondent at 41 n. 46 and see 33-34 n. 37 (nos. 89-1391, 89-1392).

27. 36 Fed. Reg. 18,465, 18,466 (1971) (codified at 42 C.F.R. § 59.5 (a)(9) (1972)).

28. Comp. Gen. Rep. No. GAO/HRD-82-106, *Restrictions on Abortion and Lobbying Activities in Family Planning Programs Need Clarification* p. 22 (1982), attached

findings that Title X family planning clinics were confused about the boundaries of the abortion ban.<sup>29</sup> The GAO reviewed fourteen clinics and found that some clinics provided brochures published by abortion clinics,<sup>30</sup> or only provided abortion counseling if the patient indicated she desired to terminate her pregnancy,<sup>31</sup> or routinely provided information on abortion as a birth control option.<sup>32</sup> In spite of the GAO's report and recommendation, HHS Secretary Heckler stated at a 1984 House Energy and Commerce Subcommittee hearing that there was general compliance with the section 1008 abortion ban.<sup>33</sup> As late as 1985, the House Energy and Commerce Committee declined to reinforce the language of section 1008 and affirmed the original conference committee report providing that section 1008 was not intended to interfere with abortion-related services not funded by Title X.<sup>34</sup>

In this atmosphere of mixed signals, President Reagan announced that the Public Health Service proposed to change Title X regulations in order to ensure compliance with section 1008 barring the use of Title X funds for abortions.<sup>35</sup>

### *B. The New Regulations*

In early 1988, the Department of Health and Human Services promulgated new regulations<sup>36</sup> that strengthened the anti-abortion

---

to Joint Appendix at 82, *Rust v. Sullivan* (nos. 89-1391, 89-1392). The Office of the Inspector General (OIG) issued a similar report based on their audit of thirty-two clinics. 53 Fed. Reg. 2922 (1988). The OIG found that the clinics had varying procedures and were confused about which activities were prohibited by section 1008. *Id.*

29. The GAO audited fourteen clinics and found various levels of abuse of the Department of Health and Human Service's (HHS) interpretation of section 1008. GAO Report at 14-15. HHS interpreted section 1008 to preclude abortion and any activity that would promote or encourage abortion. 53 Fed. Reg. 2922-01 (1988).

30. 53 Fed. Reg. 2922, n.7 (1988). The GAO also objected to the patients using the clinic telephone to make appointments with an abortion clinic. *Id.* One clinic was found to make loans to the patients with nonprogram funds. *Id.* The administrative costs associated with the unapproved activities were incorporated into Title X program costs. *Id.*

31. 53 Fed. Reg. 2922, n.6 (1988).

32. *Id.* at n.8.

33. *Reauthorization of Title; Family Planning Program: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 472 (1984) (Margaret M. Heckler, Secretary HHS stated that title X clinics "have honored the law in terms of the abortion prohibition").

34. H.R. REP. No. 159, 99th Cong., 1st Sess. 6-7 (1985), (quoting H. R. CONF. REP. No. 91-1667 91st Cong. 2d Sess. 8-9 (1970)).

35. 52 Fed. Reg. 33,210-01 (codified at 42 C.F.R. § 59).

36. Amendments of Subpart A of Part 59, 53 Fed. Reg. 2944-46 (1988) (codified at 42 C.F.R. §§ 59.2-59.10 (1988)).

provision of Title X of the Public Health Service Act.<sup>37</sup> HHS expressed several reasons for the changes. The department stated that clinic practice had strayed from the program intended by Congress, and the changes were necessary to clarify the abortion prohibition and “administer [Title X] as provided by Congress.”<sup>38</sup> HHS referred to public comments received in response to the proposed regulations in order to support its proposition that “nondirective counseling”<sup>39</sup> was misguided and resulted in uninformed choices leading to abortion.<sup>40</sup>

Under the old regulations a Title X clinic could counsel and refer a woman for abortion.<sup>41</sup> The new regulations eliminated those options in order to “enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services.”<sup>42</sup> To receive federal funds under Title X, the clinic must prove compliance with all the new regulations.<sup>43</sup> The regulations, as summarized, mandate that:

(1) A clinic cannot “provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.”<sup>44</sup> Counseling encompasses any brochures or films that include information on abortion.<sup>45</sup> This subsection acquired the tag of “the gag rule.”<sup>46</sup>

(2) A client who is diagnosed as pregnant must be referred to a provider that “promote[s] the welfare of mother and unborn child.”<sup>47</sup> The client may be referred to an emergency care provider if an emergency exists.<sup>48</sup>

---

37. 42 U.S.C. §§ 300-300(a)-7 (1982).

38. 53 Fed. Reg. 2922 (1988). The HHS’s proposed rules relied heavily on Representative Dingell’s 1970 statements on the House floor. 52 Fed. Reg. 33210-01 (1987). But see *supra* note 19.

39. Non-directive counseling involves advising a woman of her options without counseling her specifically to have an abortion. *The MacNeil/Lehrer Newshour* (PBS television broadcast, May 28, 1991 (Transcript #4042)) (comments by Karrie Galloway, Family Planning Clinic Director), available in LEXIS, Nexis Library, Currnt File.

40. 53 Fed. Reg. 2922 (1988). Comments received by the Department stated that there was no “balanced discussion” of the woman’s option, and women were pressured into abortion. *Id.* “These commentators typically stated that they had experienced severe and long-lasting regret over the decision to abort, and also stated that they were given no counseling at the time they made their decision to abort as to the remorse and guilt they might later feel.” *Id.*

41. See *supra* notes 18-23 and accompanying text.

42. 53 Fed. Reg. 2922 (1988) (citing H. REP. NO. 9101472, 91st CONG., 2nd Sess (1970), reprinted in 1970 U.S.C. Cong. Admin. News 5071).

43. 42 C.F.R. § 59.7.

44. 42 C.F.R. § 59.8 (a)(1).

45. 53 Fed. Reg. 2922.

46. See, e.g. Chervin, *supra* note 18.

47. 42 C.F.R. § 59.8(a)(2).

48. *Id.* HHS provides the example of a woman who is diagnosed with an ectopic pregnancy, and states that referral for emergency medical care would comply with the regulations. 42 C.F.R. § 59.8(b)(1).

(3) A clinic cannot weight a referral list in favor of health care providers who perform abortions, or include health care providers whose "principal business" is abortions.<sup>49</sup>

(4) A clinic may provide comprehensive information about contraception methods, but may not include information about abortion.<sup>50</sup>

(5) A clinic must be "physically and financially separate" from prohibited activities.<sup>51</sup> Any abortion related service must be done by separate personnel, in a separate facility with separate funds. Compliance is determined on a case by case basis.<sup>52</sup>

(6) A Title X recipient cannot "encourage, promote or advocate abortion as a method of family planning."<sup>53</sup> Prohibited activities include:

- (a) Lobbying for legislation that would increase the availability of abortion.<sup>54</sup>
- (b) "Providing speakers to promote . . . abortion."<sup>55</sup>
- (c) Paying dues to a group that supports abortion.<sup>56</sup>

---

49. 42 C.F.R. § 59.8(a)(3). A Title X project violates the regulations if the list includes a single clinic which "principally provides abortions." 42 C.F.R. § 59.8(b)(3). A clinic violates the regulations if the list provided fails to include appropriate providers who do not perform or refer for abortions. 42 C.F.R. § 59.8(b)(4).

50. 42 C.F.R. § 59.8(a)(4). A Title X project would not violate the statute if a client was provided a manufacturer's brochure that compared the relative safety of contraception methods and included information about abortion. 42 C.F.R. § 59.8(b)(6).

51. 42 C.F.R. § 59.9.

52. *Id.* The factors that the Secretary uses to determine compliance include:

- (a) The existence of separate accounting records;
- (b) The degree of separation from facilities (e.g., treatment, consultation, examination and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;
- (c) The existence of separate personnel;
- (d) The extent to which signs and other forms of identification of the Title X projects are present and signs and material promoting abortion are absent.

*Id.*

53. 42 C.F.R. § 59.10(a). Providing brochures that advertise an abortion clinic violates this subsection. 42 C.F.R. § 59.10(b)(1). Making an appointment for a client with a clinic that performs abortions is a violation. 42 C.F.R. § 59.10(b)(2).

54. 42 C.F.R. § 59.10(a)(1). A Title X project would not be in violation of this section if an employee individually writes his or her legislator to gain further expansion of "the legal availability of abortion." 42 C.F.R. § 59.10(b)(6). There is no violation if a Title X project is owned by an organization that lobbies for abortion, but the clinic itself is prohibited from lobbying and no project funds may be used. 42 C.F.R. § 59.10(b)(5).

55. 42 C.F.R. § 59.10(a)(2). There may be no violation if an employee of a Title X project speaks at his or her own expense. The example given specifies that the employee speak before a "legislative body," however, that same premise should carry over to any speech in support of abortion as long as no Title X funds are used in the endeavor. 42 C.F.R. § 59.10(b)(7).

56. 42 C.F.R. 59.10(a)(3). Paying dues to an entity that, "among other activities,



(d) Using legal means to increase the availability of abortion.<sup>57</sup>

(e) Preparing or distributing written, audiovisual or other material promoting abortion.<sup>58</sup>

In addition, HHS provided new definitions of key terms that are important in understanding the expansiveness of the ban on abortion counseling and referral. First, "project funds" are no longer limited to federal funds and include "grant-related income or matching funds."<sup>59</sup> This sweeps virtually all of a clinic's funding into the net of "project funds."<sup>60</sup> Thus, spending funds from a state or local source on a forbidden activity would jeopardize a Title X project's continued receipt of federal funds.<sup>61</sup> Second, "family planning" is defined to encompass only preconception services to "limit or enhance fertility."<sup>62</sup> Specifically, "[f]amily planning does not include pregnancy care . . . [or] abortion."<sup>63</sup> Consequently, once a Title X client is diagnosed as pregnant, she must be referred to another facility for prenatal care.<sup>64</sup> The referral itself is governed by the criteria set out in the regulations, and cannot include an abortion referral.<sup>65</sup>

The Secretary intended to create "a wall of separation between Title X programs and abortion as a method of family planning."<sup>66</sup> The new regulations succeed in codifying the view that "abortion is inappropriate as a method of family planning."<sup>67</sup> HHS suggests that the new regulations reflect the Department's original and consistent interpretation of section 1008 prohibiting the use of project funds for abortions.<sup>68</sup> Admittedly, HHS failed to successfully inform the Title

---

lobbies . . . to protect or expand the legal availability of abortion" is a violation of this subsection. 42 C.F.R. 59.10(b)(3). But if the Title X project is operated by an association that pays dues to the same organization, then there is no violation as long as Title X funds are not used and the clinic is not directly involved. 42 C.F.R. 59.10(b)(4).

57. 42 C.F.R. § 59.10(a)(4). The regulations give no specific examples of a violation of this section. However, the subsection operates as a catchall for any activity, including instituting a law suit that would advocate abortion.

58. 42 C.F.R. § 59.10(a)(5).

59. 42 C.F.R. § 59.2.

60. McCarthy, *supra* note 19, at 1186. "[A]ll of a clinic's funds, whatever their source, are brought within the regulations." *Id.*

61. *Id.*

62. 42 C.F.R. § 59.2.

63. *Id.* "'Family planning' means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved." *Id.* Services may be provided for contraceptive methods and infertility—including adoption, counseling, education and diagnosis—and treatment of "infections which threaten reproductive capability." *Id.*

64. 42 C.F.R. § 59.8(a)(2) (stating "[b]ecause Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social service.").

65. See *supra* notes 44-50 and accompanying text.

66. 53 Fed. Reg. 2922 (1988).

67. *Id.*

68. *Id.* The fact that HHS issued guidelines in 1981 that mandated nondirective

X fund recipients about the extent of the section 1008 ban.<sup>69</sup>

Title X has a tremendous impact on family planning in the United States.<sup>70</sup> Approximately 4,000 clinics receive up to \$200 million annually in federal funds to administer family planning services.<sup>71</sup> These clinics provide services to approximately 4.3 million women, the majority of whom are well below the poverty line.<sup>72</sup>

Proponents of the old, pre-1988 regulations suggest that family planning services offered by Title X programs have successfully reduced the incidence of unwanted pregnancies.<sup>73</sup> Proponents of the new regulations believe that under the old rules, Title X programs were guilty of at least indirectly causing abortions,<sup>74</sup> and opine that the new regulations will correct this misapplication of Title X funds.<sup>75</sup>

---

abortion counseling is at odds with the implication that HHS had always meant the section 1008 ban to encompass more than just the act of abortion. See *supra* notes 17-22.

69. See Gen. Acct. Office, *Restrictions on Abortion and Lobbying Activities in Family Programs Need Clarification* (Sept. 24, 1982), attached to Joint Appendix at 82, *Rust v. Sullivan* (nos. 89-1391, 89-1392).

70. See e.g., *Courts Cruel Legacy*, S.F. CHRON., June 2, 1991 (Editorials), at 1 (stating that 83% of clients receive no other prenatal care). See also *Fiscal Ethical Choices Face Counselors*, BOSTON GLOBE, May 24, 1991 (Metro), at 26 (advising that federal funds provide \$600,000 annually for 1/3 of a Massachusetts family planning clinic).

71. See *An Anti-Abortion Portent*, BOSTON GLOBE, May 24, 1991 (Editorials), at 14. For a different estimate see McCarthy, *supra* note 19, at 1183 (4,000 family planning clinics received \$140 million).

72. *Abortion Rulings Dual Dangers*, CHI. TRIB., May 30, 1991, at C29; Peter Brandon Bayer, *Court's Disturbing Abortion Decision*, S. F. CHRON., May 25, 1991 (Open Forum), at A18. See also *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 56 (1st Cir. 1990) (stating that an estimated 90% of Title X clients have incomes 150% below the poverty line.)

73. 136 CONG. REC. S13930 (daily ed. Sept. 25, 1990) (statement of Sen. Dodd) (stating "for every dollar spent in family planning, we save \$2 in the following year in health and welfare costs associated with unintended births"). *Contra* Philip Elmer-DeWitt, *Why Isn't Our Birth Control Better*, TIME, Aug. 12, 1991, at 52, 53 (asserting that American women are "grossly misinformed" about birth control).

74. See Dr. William Archer, Remarks at the Congressional Pro-Life Caucus News Briefing (May 31, 1991), available in LEXIS, Nexis Library, Currnt File (stating that Planned Parenthood conducted one million abortions and referred women elsewhere for another one million abortions).

75. 52 Fed. Reg. 33,210-01 (1990) (codified at 42 C.F.R. § 59). The summary states: The Public Health Service (PHS) proposes to amend the regulations governing the use of funds for family planning service under Title X of the Public Health Service Act in order to set specific standards for compliance with the statutory requirement that none of the funds appropriated under Title X may be used in programs where abortion is a method of family planning. This change is being proposed to bring the compliance requirements for programs using Title X funds into conformity with the statutory ban on such use of Title X appropriated funds. The proposed amendments should improve compli-

It is entirely unclear whether the legislature meant to include abortion counseling and referral in the section 1008 ban.<sup>76</sup>

### III. CONSTITUTIONAL ISSUES PRESENTED IN *RUST V. SULLIVAN*

#### A. *First Amendment - The Right to Freedom of Speech*

[M]en have realized . . . that the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>77</sup>

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech."<sup>78</sup> First Amendment issues often arise when an individual's right to freedom of speech conflicts with government's desire to regulate speech in order to promote some public good.<sup>79</sup> Title X Regulations and the Supreme Court's decision in *Rust v. Sullivan* create just such a tension.<sup>80</sup>

---

ance by grantees with the statute and facilitate monitoring of compliance by PHS.

*Id.*

76. Courts that addressed the issue of congressional intent since the new regulations were promulgated agree that the legislative intent is murky. *See, e.g., Massachusetts v. Sullivan*, 899 F.2d 53, 62 (1st Cir. 1990) (stating that Congress did not address the scope of section 1008, and the legislative history could support either side's interpretation); *Planned Parenthood v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990) (noting that the legislative history did not indicate whether referral and counseling was included in the abortion ban).

77. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting), *quoted in* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785-86 (2d ed. 1988).

78. U.S. CONST. amend. I. The full text of the first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Thus, a number of rights are grouped under the category of freedom of expression. These include freedom of speech, freedom of the press, freedom of assembly, freedom of petition, and freedom of association.

79. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961). The *Konigsberg* Court reviewed the issue of whether a state bar applicant could refuse to answer questions having a substantial relevance to his or her qualifications. This allowed a state to deny a license to an applicant who refused to answer questions about his or her involvement with the Communist party, even though membership in the Communist party would not in itself have provided grounds to deny the license. The *Konigsberg* Court stated:

[W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'. . . . [G]eneral regulatory statutes . . . have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress . . . to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

*Id.* at 49-51.

80. The majority in *Rust v. Sullivan*, stated that change in the regulations was justified in part by the change in the public "attitude against the 'elimination of unborn children by abortion.'" 111 S. Ct. 1759, 1769 (1991).

Not all forms of speech are equally protected. Additionally, certain established categories of speech are deemed not protected by the First Amendment.<sup>81</sup> For instance, the Court has found little value in fighting words,<sup>82</sup> or words that in themselves inflict injury,<sup>83</sup> or words that incite violent or illegal conduct,<sup>84</sup> or even in some commercial speech.<sup>85</sup> However, the restriction against abortion counseling in *Rust v. Sullivan* does not fall neatly into a predefined area of unprotected speech. Thus, the Secretary must show sufficient justification of the restriction in order to withstand a constitutional challenge.<sup>86</sup>

### 1. Content-Based and Content-Neutral Analysis

Generally, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>87</sup> The constitutionality of a statute restricting expression turns on the

---

81. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983). Presumably the first amendment protects all communication. This presumption is rebutted by finding that "a particular class of speech does not sufficiently further the underlying purposes of the first amendment." *Id.* Those classes of speech then become unprotected. Generally, the Court will classify a category of speech as unprotected if the speech has "no essential part of any exposition of ideas [and it is] of . . . slight social value as a step to truth. . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

82. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky* the Court held that certain categories of speech were not speech as meant in the first amendment. The issue in *Chaplinsky* centered on words that could "incite an immediate breach of the peace." *Id.* at 571-72.

83. *Id.*

84. Words that incite violence are associated with the "clear and present danger" doctrine that was first set out by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919). Justice Holmes explained that "[t]he question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

85. *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 456 (1978) (stating that commercial speech is afforded limited constitutional protection).

86. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (stating that a content-based restriction is subject to "exacting scrutiny"). See generally *TRIBE supra* note 76, at 789-794.

If a government regulation is aimed at the communicative impact of an act, . . . a regulation is unconstitutional unless government shows that the message being suppressed poses a 'clear and present danger,' constitutes a defamatory falsehood, or otherwise falls on the unprotected side of one of the lines the Court has drawn to distinguish those expressive acts privileged by the first amendment from those open to government regulation with only minimal due process scrutiny.

*Id.* at 791-92.

87. *Police Dep't. of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (invalidating an ordinance banning picketing in front of a school).

question of whether it is "content-based" or "content-neutral"<sup>88</sup> and the result of the ensuing analysis. Content-based restrictions are aimed at the message itself.<sup>89</sup> For example, a law directed at banning obscenity constitutes a content-based restriction.<sup>90</sup> A law is content-based if its purpose is to restrict the expression or restrict the impact of the expression.<sup>91</sup>

On the other hand, "content-neutral restrictions limit communication without regard to the message conveyed."<sup>92</sup> For instance, a law banning noisy picketing in the immediate vicinity of a school,<sup>93</sup> and a law banning the distribution of handbills to control litter<sup>94</sup> would be content-neutral. Content-neutral restrictions are generally broader than content-based restrictions.

Content-based restrictions are presumed to be antithetical to the First Amendment.<sup>95</sup> However, if the class of speech is unprotected, then the level of protection afforded the regulated speech lessens.<sup>96</sup> To date the Supreme Court has not classified speech about abortion as unprotected.

The particular speech cannot be restricted because of fear of people's reactions to the speaker's words.<sup>97</sup> The Court traditionally applies a strict scrutiny analysis to a content-based restriction challenge.<sup>98</sup> The Court will look at the motive behind the regulation,

---

88. Stone, *supra* note 81, at 195-96.

89. TRIBE, *supra* note 77, at 790; Stone, *supra* note 81, at 190.

90. See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69 (1973) (holding obscene material unprotected); *Miller v. California*, 413 U.S. 15, 22-24 (1973) (same).

91. Geoffrey R. Stone, *Content-Neutral Restriction*, 54 U. CHI. L. REV. 46, 47 (1987) [hereinafter *Content-Neutral Restriction*]. Content-based restrictions include laws aimed at seditious libel or protecting publication of secret information. *Id.* See also TRIBE, *supra* note 77, at 789. Professor Tribe indicates that a content-based restriction is easy to spot. It is a law that "on its face . . . is targeted at ideas or information that government seeks to suppress, or . . . was motivated by . . . an intent to single out constitutionally protected speech for control or penalty." *Id.* at 794. (emphasis in original).

92. Stone, *supra* note 81, at 189. See also JOHN HART ELY, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

Professor Tribe describes content-neutral restrictions as those "aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity." TRIBE, *supra* note 77, at 790 (emphasis omitted).

93. *Gaynard v. Rockford*, 408 U.S. 104 (1972) (upholding such a ban).

94. TRIBE, *supra* note 77, at 791 (citing *Schneider v. State*, 308 U.S. 147(1939)).

95. TRIBE, *supra* note 77, at 790. See also Stone, *supra* note 81, at 196 n.28 (explaining that the Court uses a standard approaching "absolute protection").

96. See *supra* notes 81-85 and accompanying text.

97. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 111 (1980). The Court has held that a regulation cannot be justified because of the concern that "the audience may find the . . . message persuasive." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 581 (1980) (Stevens, J., concurring) (holding unconstitutional a state utility commission order barring public utilities from promoting the use of electricity through advertisement).

98. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (invalidating a statute barring information on drug prices);

because "when [a] regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'"<sup>99</sup> This strict scrutiny analysis commonly results in the regulation being found unconstitutional.<sup>100</sup>

Content-neutral restrictions receive a less severe balancing approach.<sup>101</sup> To determine if the law complies with the First Amendment, the Court considers the extent of the limitation, the extent of the governmental interests in the restriction, and whether the same governmental interests can be realized through a less restrictive means.<sup>102</sup> If the governmental interest is high and the limitation on expression leaves other avenues open for communication, then the Court defers to the regulation without requiring the government to use less restrictive means.<sup>103</sup> Content-neutral restrictions are analyzed on a case by case basis by balancing the right of freedom of speech and the government's interests in restricting speech.<sup>104</sup>

The speech restriction imposed by the new regulations does not universally inhibit speech about abortion. Instead, the ban on abortion counseling and referral at Title X family planning clinics prohibits its speech about abortion within certain circumstances.<sup>105</sup> The

*Stromberg v. California*, 283 U.S. 359 (1931) (invalidating a statute prohibiting the display of a red flag in symbolic opposition to government).

99. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (Frankfurter, J., concurring) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)).

100. "[T]he Court has invalidated almost every content-based restriction that it has considered in the past quarter-century." Stone, *supra* note 81, at 196. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (stating that all content-based restrictions are subject to close judicial scrutiny).

101. Stone, *supra* note 81, at 190.

102. *Id.* See e.g., *United States v. O'Brien*, 391 U.S. 367 (1968) *reh'g denied*, 393 U.S. 900 (1968). The Court upheld a statute banning the burning of a draft card. The Court reasoned that O'Brien still had viable means to protest the war and deliver a public message, and that the government had a rationally substantial interest in prohibiting the act. *Id.* at 377.

103. Compare *United State Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (upholding a law against placing unstamped mailable material in post office mail boxes, on the ground that the civic association had other adequate means to distribute its material); and *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 654-55 (1981) (validating a law barring distribution of material at a state fair from anywhere except a licensed booth, on the ground that the group had ample opportunity to espouse their views) with *Schneider v. State*, 308 U.S.147, 162 (1939) (invalidating an ordinance banning public distribution of handbills on the ground that clean streets was an insufficient reason).

104. TRIBE, *supra* note 77, at 792.

105. See *supra* notes 44-46 and accompanying text for discussion of the regulations.

penalty for disobeying the ban is forfeiture of federal funds.<sup>106</sup>

## 2. Unconstitutional Conditions and Viewpoint Discrimination

Viewpoint discrimination generally penalizes a particular idea or speech, while leaving related ideas or speech unfettered.<sup>107</sup> This lopsided restriction results in one idea being obscured, while another, usually opposing, idea is promoted.<sup>108</sup> A law that creates such a result offends the First Amendment because "a law that substantially restricts the expression of a particular idea, viewpoint, or item of information . . . effectively prevents individuals from expressing their views."<sup>109</sup>

There is general disagreement about the extent that viewpoints are or should be protected by the First Amendment.<sup>110</sup> However, the Court has generally found unconstitutional legislation that hinders the voice of certain ideas.<sup>111</sup> For instance, the Court overturned the suspension of two students who wore black armbands in protest of the Vietnam war, noting that the school allowed other forms of political expression.<sup>112</sup> Nevertheless, the Court has suggested that viewpoint discrimination may be constitutional where "there is an appropriate governmental interest suitably furthered by the differential treatment."<sup>113</sup> What should be construed as "suitable" has yet to be precisely defined.<sup>114</sup> However, by upholding the Secretary's inter-

---

106. See discussion *supra* at note 43 and accompanying text.

107. McCarthy, *supra* note 19, at 1197.

108. Stone, *supra* note 81, at 198.

109. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960). For examples of such laws see, e.g., The Espionage Act of 1917, 40 Stat. 217 (prohibiting critical comments about the war and draft); and The Smith Act, Ch. 438, 54 Stat. 670, 671, codified at 18 U.S.C. §§ 10, 11 (1946)) (prohibiting advocating the violent overthrow of the government).

See also, Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207-08 (1982) (explaining that "the central meaning of the First Amendment" lies in its protection of debate of public issues" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964))).

110. Stephan, *supra* note 109 offers a comprehensive discussion of the different viewpoints. While there is general consensus that political speech is protected, the same consensus does not exist for nonpolitical speech. *Id.* at 209. However, one group would protect any expression that "enhance[s] the electorate's 'capacity for sane and objective judgment.'" *Id.* (quoting Harry Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 SUP. CT. REV. 191, 221).

111. Stephan, *supra* note 109, at 209-11.

112. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 396 U.S. 503 (1969). See also *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating a state law that allowed church services in a public park, but prohibiting religious meetings in the same park in an effort to ban a Jehovah's Witness meeting); *Cox v. Louisiana*, 379 U.S. 536 (1965) (where the Court struck down a law that allowed labor organizations to block the streets to espouse a view, but denied the same privilege to other groups). Justice Black stated that "if the streets of a town are open to some views, they must be open to all." *Id.* at 580 (Black, J. concurring).

113. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

114. Three cases are good examples of the Court's position. *FCC v. League of Wo-*

pretation of the ban on abortion counseling and referral in Title X, the "suitable" boundary has expanded to at least include the government's advocacy of child birth over abortion,<sup>115</sup> thus supporting the view that the government has the right to articulate its views on the propriety of abortion in publicly funded programs,<sup>116</sup> even at the expense of suppressing another view.

The Title X regulations and the decision in *Rust v. Sullivan* raise the issue of viewpoint discrimination in the context of conditional federal funding.<sup>117</sup> Outside of the abortion realm, the Supreme Court has taken the position that a condition was unconstitutional if it affected an individual right.<sup>118</sup>

No clear delineation exists as to the boundaries of the legislature's ability to impose conditions upon the recipients of federal funds—conditions that could not otherwise be invoked.<sup>119</sup> The doctrine of unconstitutional conditions embraces the idea that "government may

men Voters, 468 U.S. 364 (1984) involved a ban on editorials by publicly funded radio stations. The Court struck down the ban on the ground of viewpoint discrimination explaining that the government could not purchase first amendment rights through its subsidy of a station. *Id.* at 390-91.

Arkansas Writer's Project v. Ragland, 481 U.S. 221, 227-28 (1987) stated that a discriminatory tax scheme on certain magazines violated the first amendment.

In *Regan v. Taxation with Representation*, 461 U.S. 540 (1963), the Court upheld a law that prohibited a tax deduction if a charitable contribution was made to a non-profit organization that engaged in lobbying. The law forbade all lobbying, not just that which was aimed at a particular viewpoint. The Court stated that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to [aim] at the suppression of dangerous ideas." *Id.* at 548 (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

115. *Rust v. Sullivan*, 111 S. Ct. 1759, 1766, 1774.

116. Theodore C. Hirt, *Why The Government Is Not Required To Subsidize Abortion Counseling And Referral*, 101 HARV. L. REV. 1895, 1904 (1988).

117. *See Rust*, 111 S. Ct. 1759.

118. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a requirement that veterans take a loyalty oath as a condition of receiving the veteran's property tax exemption). *See also Shapiro v. Thompson*, 394 U.S. 618 (1969) (overruling a statute that denied welfare benefits to new residents); *Sherbert v. Verner*, 374 U.S. 398 (1963) (overturning the denial of state unemployment benefits to an employee who would not work on Saturday for religious reasons).

119. *See Albert J. Rosenthal, Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1105-06 (1987). *See e.g., John O. French, Unconstitutional Conditions: An Analysis*, 50 GEO. L. J. 234 (1961); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

Professor Kreimer states that "the distinction between liberty-expanding offers and liberty-reducing threats turns on the establishment of an acceptable baseline against which to measure a person's position after imposition of an allocation." Seth F. Kreimer, *Allocation Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352 (1984).



not do indirectly what it may not do directly.”<sup>120</sup> An unconstitutional condition is created when the government conditions the receipt of a benefit on forfeiture of a constitutional right, a right such as the freedom of speech.<sup>121</sup> The benefit involved is always discretionary—a benefit the government is not compelled to provide.<sup>122</sup>

A condition becomes unconstitutional when it is overly coercive.<sup>123</sup> The Supreme Court has stated that there is no compulsion where only five percent of a project’s funds are in jeopardy.<sup>124</sup> Further, the Court has decided that non-subsidies do not fall into the same quagmire as coercion.<sup>125</sup> On two occasions, the Court upheld laws that precluded state or federal subsidies for abortion.<sup>126</sup> However, until *Rust v. Sullivan*, the Court did not allow a conditional use of federal funds if the condition also “impair[ed] the recipients’s use of its own money.”<sup>127</sup> With the sweeping definition of “program funds” in the new regulations, a family planning clinic may lose its federal subsidy if the facility uses any program related funds to counsel or refer for abortions.<sup>128</sup>

---

120. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). See also Richard A. Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, And the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) (stating “in the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution”).

The doctrine of unconstitutional conditions is not without its foes. It has been challenged as “logically incoherent and corrosive of sovereign power.” Epstein at 10. Justice Holmes addressed the issue by stating:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 229, 29 N.E. 517, 517-18 (1892) quoted in Epstein at 10 n.14.

121. McCarthy, *supra* note 19, at 1195.

122. Sullivan, *supra* note 120, at 1422-23. “If government must provide a benefit unconditionally, it may not offer that benefit conditionally regardless of the content of the condition.” *Id.* at 1423.

123. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). In *Dole*, the Supreme Court upheld conditioning the receipt of federal highway funds on states raising the drinking age to twenty-one. The Court found that the condition was not coercive because a state who wished to maintain a lower drinking age would only lose a small portion - approximately five percent - of federal funds. *Id.*

124. See *id.* at 211, and discussion *supra* at note 122.

125. The Court has held that withholding subsidies for abortion procedures does not coerce a woman into choosing childbirth, and has allowed such laws to stand. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) and *Maier v. Roe*, 432 U.S. 464 (1977).

126. See *infra* notes 129-151 and accompanying text.

127. Sullivan, *supra* note 120, at 1468.

128. See *supra* notes 59-61 and accompanying text.

## B. Federal Funding and Abortion

The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency.<sup>129</sup>

Even prior to *Rust v. Sullivan*, the Supreme Court unequivocally established that the government could discourage abortion through its funding programs,<sup>130</sup> and promote the public policy decision that childbirth is preferred over abortion.<sup>131</sup>

### 1. Maher v. Roe

In *Maher v. Roe*, two indigent women challenged a Connecticut regulation prohibiting Medicaid funding of nontherapeutic abortions.<sup>132</sup> The Court began with the premise that the state was not obligated to pay for any "pregnancy-related medical expenses of indigent women."<sup>133</sup> But, once the state elected to provide some medical care, then its allocation of funds was limited by the Constitution.<sup>134</sup>

The appellees questioned whether treating medical expenses incident to childbirth differently from medical expenses incident to abortion violated the Equal Protection Clause of the Fourteenth Amendment.<sup>135</sup> The Court averred that a woman has no constitutional right to an abortion, but only the freedom to choose an abortion, and that the Connecticut regulations did not infringe upon the freedom of choice.<sup>136</sup> Further, the *Maher* Court stated that there was

---

129. *Harris v. McRae*, 448 U.S. 297, 316 (1980).

130. See *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989). See generally Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981).

131. *Harris*, 448 U.S. at 317-18.

132. *Maher*, 432 U.S. at 466-67.

Professor Epstein suggests that the state's "lesser power" is to exclude abortions from Medicaid funding, and the state's "greater power is . . . [to] decide to have no Medicaid program at all." Epstein, *supra* note 120, at 90.

133. *Maher*, 432 U.S. at 469.

134. *Id.*

135. *Id.* The Equal Protection Clause states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

136. *Maher*, 432 U.S. at 473-74.

"no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."<sup>137</sup>

The Court reasoned that the State's nonfunding of abortions did not create any additional barriers to an indigent woman's ability to obtain an abortion.

The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.<sup>138</sup>

In a dissenting opinion, Justice Marshall expressed the "fear 'that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions' on governmental funding for abortion."<sup>139</sup> That fear came to fruition in *Harris v. McRae*.<sup>140</sup>

## 2. Harris v. McRae

The result of the Court's decision in *Harris v. McRae*, was ratification of the Hyde Amendment,<sup>141</sup> which denied the use of public funds for even medically necessary abortions.<sup>142</sup> The divided Court<sup>143</sup> continued its line of thought, which germinated in *Maher v. Roe*,<sup>144</sup> and affirmed that Congress has no obligation to remove an obstacle, such as poverty, in order to allow a woman to obtain an

---

137. *Id.* at 474. See also *Beal v. Doe*, 432 U.S. 438, 447 (1977) (holding that title XIX of the Social Security Act did not require nor preclude the funding of nontherapeutic abortions); *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (stating that publicly owned hospitals did not have to offer free abortions to the indigent even though the hospital provided free childbirth procedures).

138. *Maher*, 432 U.S. at 474.

139. *Id.* at 481 (Marshall, J. dissenting.)

140. *Harris v. McRae*, 448 U.S. 297 (1980).

141. The Hyde Amendment refers to the funding restrictions passed by Congress, by amendment, to the annual appropriations bills for the Medicaid program. Title XIX of the Social Security Act, 79 Stat. 343 codified as amended 42 U.S.C. § 1396 et. seq. (1976)).

142. The Hyde Amendment that was applicable when challenged by *Harris v. McRae* stated:

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Pub. L. No. 96-123 § 109, 93 Stat. 926.

143. Justice Stewart wrote the majority opinion joined by Chief Justice Burger and Justices White, Powell, and Rehnquist. Justice Brennan wrote the dissent, joined by Justices Marshall, Blackmun, and Stevens.

144. See *supra* notes 133-139 and accompanying text.

abortion.<sup>145</sup> However, Congress could not create new obstacles.<sup>146</sup>

While the majority opinion reaffirmed Congress' ability to promote childbirth through allocation of funds,<sup>147</sup> the dissenters would have found the Hyde Amendment unconstitutional because of its "coercive impact."<sup>148</sup> The majority reasoned that abortion was the only medical procedure to involve the "purposeful termination of a potential life," and must be analyzed differently.<sup>149</sup> The *Harris* decision validated existing state statutes that limited or proscribed public funding of abortion and allowed other states to enact such legislation.<sup>150</sup> Relying on *Maier*, the majority concluded that an indigent woman was

---

145. *Harris*, 448 U.S. at 315.

146. *Id.* The majority reiterated the language and reasoning from *Maier v. Roe*. *Id.* In a dissenting opinion, Justice Brennan stated that "[t]he Hyde Amendment's denial of public funds for medically necessary abortions plainly intrudes upon th[e] constitutionally protected decision" established in *Roe v. Wade*: a woman has a "a right to be free from state interference with her choice to have an abortion." *Id.* at 330 (Brennan, J., dissenting, joined by Marshall, J. and Blackmun, J.).

147. *Id.* at 315-19.

148. *Id.* at 330 n.4 (Brennan, J., dissenting). "Antipathy to abortion . . . has been permitted not only to ride roughshod over a woman's constitutional right to terminate her pregnancy in the fashion she chooses, but also to distort our Nation's health-care programs. As a means of delivering health services, then, the Hyde Amendment is completely irrational." *Id.* (Brennan, J., dissenting)

149. *Id.* at 325.

150. See COLO. REV. STAT. § 26-15-104.5 (1990) (no public funds for induced abortion); ILL. ANN. STAT. ch. 23, para. 5005 (Smith-Hurd 1990) (no public funds for the purpose of abortions); IND. CODE ANN. § 16-10-3-3 (West 1984) (no public funds for abortion unless mother's life is endangered); KY. REV. STAT. ANN. § 311.715 (Michie/Bobbs-Merrill 1984) (no public funds for abortion); LA. REV. STAT. ANN. § 40:1299.34.5 (West 1991) (no public funds unless abortion necessary to save mother's life); MICH. COMP. LAWS ANN. § 400.109(a) (West 1991) (no public funds unless abortion necessary to save mother's life); MINN. STAT. ANN. § 261.28 (1991) (state funds shall not be used for abortion); MO. ANN. STAT. § 188.205 (Vernon 1991) (no public funds for abortion unless to save life of mother); NEB. REV. STAT. § 44-1615.01 (1990) (no funds for abortions); N.J. STAT. ANN. § 30:4D-6.1 (West 1981) (no state medical assistance payments for abortions); N.C. GEN. STAT. § 7A-474.3 (1990) (no public funds shall be used to assist in performance of an abortion); OHIO REV. CODE ANN. § 5101.55 (Anderson 1989) (no state or local funds to subsidize an abortion unless life is endangered); TEX. HEALTH & SAFETY CODE ANN. § 32.005 (West 1991) (public funds may not be used for abortion services unless the mother's life is in danger); UT. CODE ANN. § 76-7-323 (1981) (no public funds for abortion or contraceptive services for an unmarried minor); S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1978) (no public funds for abortions); 62 PA. CONS. STAT. ANN. § 453 (1990) (no public funds for abortion unless mother's life is in danger); VA. CODE ANN. § 32.1-92.1 (Michie 1982) (allowing public funds for abortions resulting from rape or incest); WIS. STAT. ANN. § 66.04 (1991) (proscribes any public funds for nontherapeutic abortions); WIS. STAT. ANN. § 20.927 (1986) (same); P.R. Laws Ann. tit. 29 § 683 (1989) (no social security payments for abortions).

For a further discussion of state limitations on abortion funding see B. J. George, Jr., *State Legislatures Versus The Supreme Court: Abortion Legislation in the 1980's*, 12 PEPP. L. REV. 427, 508-09 (1985).

no worse off than if there were no Medicaid funding at all.<sup>151</sup> This sentiment was repeated in 1991 in *Rust v. Sullivan*.<sup>152</sup>

### 3. Webster v. Reproductive Health Services

In *Webster v. Reproductive Health Services*<sup>153</sup> the Court upheld a Missouri law proscribing the use of public facilities or employees to perform abortions.<sup>154</sup> Missouri already had a law prohibiting public funds from being used for abortion<sup>155</sup> and thus, the Court reasoned that the woman would have no greater burden if she was required to go to a private center for the procedure.<sup>156</sup> The Court, relying on both *Maier* and *McRae* to reach its decision in *Webster*, stated that "to use public facilities and staff to encourage childbirth over abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." <sup>157</sup>

Interestingly, in *Webster*, the Eighth Circuit also declared unconstitutional the prohibition against the use of state funds, employees and facilities for abortion counseling.<sup>158</sup> The State appealed only the use of funds and not the employee or facility ban, and subsequently, that part of the lower court decision still stands.<sup>159</sup> Ultimately, because the fund restriction was limited to only "persons responsible for expending public funds," the Court found that the restriction was not aimed at any physician, making the issue moot as to the *Webster* plaintiffs.<sup>160</sup> However, the Court indicated that a serious controversy could exist if the prohibition meant that publicly employed health professionals could not give abortion advice to pregnant women.<sup>161</sup>

*Maier v. Roe*, *Harris v. McRae* and *Webster v. Reproductive Services* suggest that the Court will not easily find that the restriction of public funding associated with abortions is an impediment to a woman's ability to obtain an abortion, as provided by *Roe v. Wade*.<sup>162</sup> *Maier*, *Harris* and *Webster* comprise the abortion funding backdrop against which *Rust v. Sullivan* was decided.

---

151. *Harris*, 448 U.S. at 316-17.

152. *Rust v. Sullivan*, 111 S. Ct. 1759, 1776-77 (1991).

153. 492 U.S. 490 (1989).

154. *Webster*, 492 U.S. at 507-08.

155. See *supra* note 150.

156. *Webster*, 492 U.S. at 509-10.

157. *Id.* at 509 (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

158. *Reproductive Health Servs. v. Webster*, 851 F.2d 1071 (8th Cir. 1988), *rev'd sub nom Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

159. *Webster*, 492 U.S. at 511-12.

160. *Id.* at 512-13.

161. *Id.* at 524 (O'Connor, J., concurring in part and concurring in the decision); *Id.* at 539 n.1 (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part.)

162. 410 U.S. 113 (1973).

C. *The Griswold*<sup>163</sup> "Penumbra" - *The Right to Privacy*

[T]he right of privacy . . . is the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>164</sup>

The "right to privacy" encompasses those interests the Supreme Court has deemed fundamental rights.<sup>165</sup> These include marriage, child-bearing and child-rearing.<sup>166</sup> In *Griswold v. Connecticut*, the Court struck down a statute prohibiting the use and distribution of contraceptives among married people.<sup>167</sup> That right of privacy was extended to unmarried adults in *Eisenstadt v. Baird*.<sup>168</sup> The Supreme Court's subsequent decisions have been interpreted to mean that "whether one person's body shall be the source of another life must be left to that person and that person alone to decide."<sup>169</sup> The abortion debate pits the principal of physical autonomy against the equally compelling principal that innocent life must be preserved.<sup>170</sup> Notwithstanding the fundamental controversy, the Court extended the right of privacy to include a woman's decision whether to end her pregnancy.<sup>171</sup>

163. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Supreme Court held that use of contraceptives by married persons could not be made a crime, and subsequently, a person providing contraceptives could not be punished for a crime. *Id.* at 485.

164. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

165. *Griswold*, 381 U.S. at 485. The *Griswold* Court found that the First, Third, Fourth, Fifth and Ninth Amendments created a zone or penumbra where privacy is protected from government intrusion. *Id.* Prior to its *Griswold* decision, the Court recognized marriage and procreation rights as fundamental and invalidated a mandatory sterilization statute for persons convicted of moral turpitude crimes. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). However, an earlier Court did not extend that same fundamental right to the mentally disabled. *Buck v. Bell*, 274 U.S. 200 (1927).

166. See e.g., *Carey v. Population Services International*, 431 U.S. 678 (1977) (invalidating law prohibiting sales of contraceptives to minors); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (allowing use of contraceptives by single people); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (allowing use of contraceptives between married people); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating mandatory sterilization of felons convicted of moral turpitude); *Pierre v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing parent's right to send children to parochial school).

167. *Griswold*, 381 U.S. at 485.

168. *Eisenstadt*, 405 U.S. at 453.

169. *TRIBE*, *supra* note 177, at 1340.

170. *Id.* However, Professor Tribe articulates that there is no "clearer case of bodily intrusion" than to require a woman to carry a child to term. *Id.*

171. *Roe v. Wade*, 410 U.S. 113, 153 (1973). See also *Doe v. Bolton*, 410 U.S. 179 (1973).

The *Roe v. Wade* Court held that only a compelling state interest could infringe on a woman's right to an abortion and such an interest could not exist during the first trimester when an abortion was medically safer than carrying the baby to term. *Roe*, 410 U.S. at 155-56, 163, 165. The decision allows the state to reasonably regulate abortions

The issue of privacy as it applies to abortion has been before the Court many times. The Court has responded by invalidating laws that threaten a woman's autonomy in her decision to have an abortion.<sup>172</sup> In particular, the Court invalidated state laws that unduly influenced a woman's informed consent whether to elect abortion or childbirth.<sup>173</sup> The decisions since *Roe v. Wade* establish clearly that a woman has a fundamental right to decide to terminate her pregnancy.<sup>174</sup>

However, it is not clear that the Court considers abortion itself a fundamental right.<sup>175</sup> This is an important distinction. A fundamen-

---

in the second trimester to ensure a safe procedure, and to proscribe abortion in the third trimester when the fetus is deemed viable. *Id.* at 163.

Justice Rehnquist argued in a dissenting opinion that the abortion issue did not raise a right to privacy claim. *Id.* at 172 (Rehnquist, J., dissenting). By definition, a "transaction resulting in an operation . . . is not 'private' in the ordinary sense of the word." *Id.* (Rehnquist, J., dissenting).

Professor Tribe prefers the term "autonomy" to "privacy" to describe a woman's right to decide whether to bear a child. *TRIBE, supra* note 177, at 1352.

172. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 763-78 (1986) (stating that a woman is entitled to protection from harassment in exercising her constitutional right to control her reproductive choices); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 443-44 (1983) (invalidating a law that went beyond ensuring a woman's consent to the abortion and attempted to influence a woman's "informed choice between abortion and childbirth"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 81 (1976) (noting that record keeping was permissible during the first trimester as long as the process was not so burdensome that it became an unconstitutional restriction).

However, the Court has been willing to require that a minor notice a parent prior to an abortion. See *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990). See generally, Selina K. Hewitt, Note, *Hodgson v. Minnesota: Chipping Away at Roe v. Wade In the Aftermath of Webster* 18 *PEPP. L. REV.* 955 (1991) (explaining the impact of upholding the country's strictest parental notification statute).

173. The Court has invalidated laws that attempt to persuade a woman to withhold consent to an abortion. See, e.g., *Akron*, 462 U.S. at 443-44 (invalidating a law that required information "not to inform the woman's consent, but to persuade her to withhold it altogether"). The Court has not upheld laws requiring a woman to be advised of available assistance from the father or social services. See, e.g., *Thornburgh*, 476 U.S. at 759-63 (concerning prenatal care and childbirth counseling requirements).

174. *Akron*, 462 U.S. at 420 n.1. Although the majority decision in *Akron* supported the principles set forth in *Roe v. Wade*, the basic tenets are not secure in the law. See generally *Guttmacher, Law, Morality, and Abortion*, 22 *RUTGERS L. REV.* 415 (1968); *TRIBE, supra* note 77 at 1347 n.69, 71.

In *Maier v. Roe*, the Court emphasized that "[a] woman has at least an equal right to choose to carry her fetus to term as to choose to abort it. Indeed, the right of procreation without state interference has long been recognized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.'" *Maier v. Roe*, 432 U.S. 464, 472 n.7 (1977) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

175. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 520, 3058 (1989) (plurality opinion) (Rehnquist, C.J., joined by White and Kennedy, J.J.) (stating that Justice Rehnquist was reluctant "to elaborate the abstract differences between a 'fundamental right' to abortion, . . . a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause"). The plurality opinion in *Webster* indicated that the right to an abortion was a liberty interest. *Id.* See also Christopher A. Crain, Note, *Judicial Restraint and the Non-Decision in Webster v. Re-*

tal right can only be upset if there is a compelling state interest.<sup>176</sup> *Roe v. Wade* gave a woman the fundamental right to choose an abortion, but apparently not to have the abortion itself.<sup>177</sup> This allows the Court to apply a less stringent standard when reviewing cases that impact the abortion decision, but which do not directly restrict or bar a woman's right to make that decision.<sup>178</sup> The result can be seen in cases regarding federal funding for abortion cases, which culminated in the *Rust v. Sullivan* decision.

---

*productive Health Services*, 13 HARV. J.L. & PUB. POL'Y 263 (1990). Professors Farber and Nowak believe that "[t]o the extent the distinction is relevant . . . abortion is a fundamental right." Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience With the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 533 n.73 (1990).

Fundamental rights, outside the abortion realm, recognized by the Court include: freedom of Association (*NAACP v. Alabama*, 357 U.S. 449, 460-61. (1958)); liberty interests (*Meyer v. Nebraska*, 262 U.S. 390 (1923)); marriage and procreation (*Skinner* 316, U.S. at 541.), and privacy interests (*Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)).

176. *Roe v. Wade*, 410 U.S. 113, 155-56 (1973). See Farber & Nowak, *supra* note 175 at 523 (pointing out that in the mid-1980s it was "black letter" law that *Roe v. Wade* required strict scrutiny only to decide if the pre-viability regulation was a "reasonable health regulation"). Farber and Nowak suggest that the *Roe v. Wade* standard was too limiting and has fallen away to a "reasonableness" test that reflects the unwritten rules that an abortion regulation will be upheld if it will:

(1) [P]rotect the woman's health, (2) ensure that minors make responsible decisions, or (3) protect a viable or potentially viable fetus. A health regulation may not unduly burden the right to abortion. Statutes protecting possibly viable fetuses must not be so vague as to deter abortions of nonviable fetuses and must allow abortions when a physician finds a significant threat to the life or health of the woman. So long as it does not impose a significant barrier to, or a penalty for, abortions, the state may take other steps to discourage women from choosing to have an abortion.

*Id.* at 520-21.

177. Justice Blackmun, author of the *Roe v. Wade* opinion, would likely disagree. *Roe v. Wade* declared that there could be no compelling state interest in the first trimester worthy of denying a woman the right to abortion, and therefore created a virtual right to an abortion during the first trimester. *Roe*, 410 U.S. at 163. This is contrary to the companion case where the Court stated that there was no right to "abortions on demand." *Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

178. *TRIBE*, *supra* note 77, at 1345. See also James M. McGoldrick, Jr., *The Separation of Powers Doctrine: Straining out Gnats, Swallowing Camels?*, 18 PEPP. L. REV. 96, 115-16 (1990) But see Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lochan Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L. J. E. 723, 752 (1990) (asserting that "society has a sufficiently compelling interest that justifies legislative regulations").

Justice O'Connor believes that when abortion regulations are at issue, the court should determine whether the laws bear a rational relation to a legitimate state interest. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). The rational basis test is elevated to strict scrutiny when an "undue burden" is placed on a fundamental right. *Id.* (O'Connor, J., dissenting) (citing *Akron*, 462 U.S. at 461-63 (O'Connor, J., dissenting).)



#### IV. ANALYSIS OF *RUST V. SULLIVAN*

##### A. *Facts of the Case and Procedural History*

Dr. Irving Rust is described as “[a] soft-spoken, Harlem-raised physician,”<sup>179</sup> who faithfully followed the section 1008 ban on performing abortions using Title X funds.<sup>180</sup> However, when the Secretary promulgated the new regulations in 1988,<sup>181</sup> Dr. Rust, along with other doctors impacted by the new regulations, and Title X recipients, challenged the legality of the regulations.<sup>182</sup> Four suits were filed by December 7, 1988, which caused the Secretary to issue a “Notice of Court Action,” advising that the new regulations would not immediately affect all Title X recipients, until the appellate process was complete.<sup>183</sup>

The circuits were split in their interpretation of the constitutionality of the new regulations.<sup>184</sup> The First Circuit in *Massachusetts v. Secretary of Health and Human Services* upheld an injunction against the new regulations, stating that the new regulations were unconstitutional because they created a “significant obstacle” in the path of a woman’s decision to terminate her pregnancy.<sup>185</sup> The obsta-

---

179. Ellen Goodman, *A Purley Political Decision by the Court*, SEATTLE TIMES, May 29, 1991, at A10.

180. *Id.* Dr. Rust is the Medical Director of the Bronx Center of Planned Parenthood of New York City, Inc. which received fifty percent of its family planning budget from Title X funds. See *New York v. Bowen*, 690 F.Supp. 1261, 1263 (1988).

181. See *supra* notes 36-37 and accompanying text.

182. *Rust v. Sullivan*, 111 S. Ct. 1759, 1766 (1991).

183. 53 Fed. Reg. 49,3202-02 (1988). The notice stated:

Four suits were filed in three jurisdictions by various organizations and individuals seeking to have the February 2nd rules declared invalid and their operations enjoined. In two of the suits, permanent injunctions were entered enjoining the Department from enforcing the rules against the parties to those suits. . . . In the remaining two suits, the government prevailed and the complaints were dismissed. . . . As a result of this court action, the rules promulgated on February 2, 1988 are currently effective with respect to certain organizations and not with respect to others.

*Id.*

184. Compare *Massachusetts v. Secretary of Health and Human Services*, 899 F.2d 53 (1st Cir. 1990) (invalidating the new regulations), and *Planned Parenthood Federation of America v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990) (same), with *New York v. Sullivan*, 889 F.2d 401 (2nd Cir. 1989) (upholding the regulations).

185. *Massachusetts*, 899 F.2d at 65. The court first applied a four-part test to determine congressional intent. *Id.* at 58. These factors included: “(1) [T]he language of the statute; (2) the contemporaneous legislative history; (3) any subsequent legislative history, and (4) agency interpretation(s) of the statute.” *Id.* (citing *Consumer Product Safety Comm’n. v. GTE Sylvania*, 447 U.S. 102, 108-20 (1980)). Applying the four-part test, the court found the statutory language inconclusive, and the legislative history inconclusive except for the history pertaining to the physical and financial separation of facilities outlined in section 59.9, which the court believed violated congressional intent. *Id.* at 58-60. The court agreed with the Secretary’s argument that subsequent ratification of the original Title X wording did not “necessarily indicate that the new regulations violated congressional intent.” *Id.* at 61. Finally, the court found that a heightened standard of review was unwarranted and that the Secretary provided some

cles created included regulating the physician-patient dialogue and restricting private funds for abortion counseling and services.<sup>186</sup>

In *Planned Parenthood Federation of America v. Sullivan*, the Tenth Circuit also affirmed an injunction against the regulations, holding that the regulations violated both the First and Fifth Amendments.<sup>187</sup> The court essentially followed the same path as the First Circuit by initially determining whether the 1988 regulations were permissible under the statute.<sup>188</sup> The *Planned Parenthood* court agreed with the First Circuit in concluding that only the section of the new regulations requiring separate physical facilities was an impermissible construction of the statute.<sup>189</sup> It did not find the *Maier v. Roe*, *Harris v. McRae* and *Webster v. Reproductive Services*<sup>190</sup> line of cases controlling.<sup>191</sup> Where the statutes in *Maier* and its progeny were held not to place any new obstacle in a woman's quest to obtain an abortion,<sup>192</sup> the new Title X regulations led the Court to an inapposite result.<sup>193</sup>

In *New York v. Sullivan*,<sup>194</sup> the first of the three United States Court of Appeals cases to be decided, the Second Circuit held that the regulations were a permissible construction of Title X and that the regulations passed the constitutional challenge.<sup>195</sup> The *Sullivan* court found that all of the new regulations comported with the Title X statute and the authority granted to the Secretary under that stat-

---

evidence of a "reasoned basis for change." *Id.* at 62-64. Based on the foregoing analysis, the First Circuit decided that the court must address the constitutional issues presented in the new regulations. *Id.* at 64.

186. *Id.* at 70-71.

187. 913 F.2d 1492, 1495 (10th Cir. 1990). The Tenth Circuit found itself in accord with the First Circuit on the constitutional issues.

188. *Id.* at 1503.

189. *Id.* at 1497. The court referred to 42 U.S.C. section 300a-6 which prohibits discrimination against personnel who decline to perform abortions to support its conclusion that section 59.9, which results in the denial of Title X grants when the grantee was unable to meet the separation requirement, violated congressional intent. *Id.* at 1498.

190. See *supra* notes 132-162 and accompanying text.

191. *Planned Parenthood*, 913 F.3d at 1499.

192. See *supra* notes 129-162 and accompanying text.

193. *Planned Parenthood*, 913 F.2d at 1501.

"[B]y denying Title X providers the right to mention abortion, to refer to abortion as an option, or to provide professional referrals to others whom they know will counsel about all medical options that are legal, including abortion, the government has placed a state-created 'obstacle in the path of a woman's exercise of her freedom of choice.'"

*Id.* (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

194. 889 F.2d 401 (2d Cir. 1989).

195. *Id.* at 404.

ute to administer the regulations.<sup>196</sup> Relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>197</sup> the Court concluded that the Secretary's interpretation merited deference, even where it was sharply different from earlier interpretations.<sup>198</sup> The Second Circuit, contrary to the First and Tenth Circuits, determined that the 1988 regulations "create[d] no affirmative legal barriers to access to abortion."<sup>199</sup> The court found them constitutional under the rationale of *Webster v. Reproductive Services*.<sup>200</sup> Further, the *Sullivan* court held that the regulations did not violate the First Amendment rights of either the Title X recipient employees or their clients.<sup>201</sup>

The Supreme Court affirmed the Second Circuit in *Rust v. Sullivan*,<sup>202</sup> and thus resolved the split among the Courts of Appeal.

## B. Analysis of the Case

### 1. Majority Opinion

#### a. The Secretary's Interpretation Merits "Substantial Deference"

The Supreme Court previously established that abortion funding cases would be scrutinized using the rational basis test.<sup>203</sup> Under a rational basis test, the Court consistently has upheld restrictions on the public funding of abortion.<sup>204</sup> Notwithstanding that background, the threshold question of whether the Secretary's new interpretation of Title X was a permissible interpretation of the statute became critical to the outcome of *Rust v. Sullivan*.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>205</sup> the Supreme Court addressed the issue of ambiguous regulatory language and established that the agency's reasonable interpre-

---

196. *Id.* at 404-10.

197. 467 U.S. 837 (1984).

198. *Sullivan*, 889 F.2d at 409.

199. *Id.* at 411.

200. 492 U.S. 490 (1989). See *supra* notes 153-161 and accompanying text.

201. *Sullivan*, 889 F.2d at 412.

202. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). Chief Justice Rehnquist delivered the opinion of the Court in which Justices White, Kennedy, Scalia and Souter joined. Justice Blackmun wrote a dissenting opinion joined by Justice Marshall, joined in Part I by Justice O'Connor and joined in parts II and III by Justice Stevens. Justice Stevens and Justice O'Connor each filed a separate dissenting opinion.

203. See *Maher v. Roe*, 432 U.S. 464, 478-80 (1977). Under the rational basis test, a law will be upheld if it rationally relates to a legitimate government interest. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). For a discussion of the rational basis test applied to abortion funding see McGoldrick, *supra* note 178, at 115-16.

204. See *supra* note 178 and accompanying text. Professor McGoldrick ponders whether the abortion funding cases may have turned out differently if the Court applied a reasonable basis test that would have given more consideration to the "interest of indigent women." McGoldrick, *supra* note 178, at 119.

205. 467 U.S. 837 (1984).

tation would prevail when ambiguity existed.<sup>206</sup> All of the lower courts reviewing the Secretary's new regulations, as well as the Supreme Court, agreed that the language of section 1008 was ambiguous.<sup>207</sup> Further, the legislative history of section 1008 does not clarify the congressional intent behind the phrase that "[n]one of the funds . . . shall be used in programs where abortion is a method of family planning."<sup>208</sup> Once the Supreme Court concluded that the statute was ambiguous, then the Secretary's interpretation could only be denied if it was found to be unreasonable, or if the Secretary's construction was deemed an otherwise permissible construction that raised "serious constitutional problems."<sup>209</sup>

The Court applied substantial deference in reviewing the Secretary's new regulations, stating that "[t]he Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent."<sup>210</sup> Relying on *Chevron*, the Court guaranteed the acceptance of the Secretary's new regulations by requiring only that the interpretation be a permissible construction.<sup>211</sup> Neither side of the *Rust v. Sullivan* debate persuasively argued that Congress had indeed indicated its intent on the questions of funding abortion referral and counseling,<sup>212</sup> or requiring that Title X clinics maintain financially and physically separate facilities.<sup>213</sup>

Dr. Rust argued that the Secretary's new regulations merited little

206. *Id.* at 843. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990). Professor Sunstein notes that the *Chevron* decision is a break with the conclusion that courts determine the law, and bestows greater autonomy on agencies. *Id.*

207. *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991). See *supra* notes 184-201 and accompanying text for the lower courts' decisions, and *supra* notes 15-34 and accompanying text for a discussion of section 1008.

208. 42 U.S.C. § 300a-6 (1990).

209. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

210. *Rust*, 111 S. Ct. at 1767.

211. *Id.* at 1767. The petitioners averred that the 1988 regulations were an impermissible construction since they raised "grave constitutional concerns." See *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909).

212. The records of the lower courts show that the consensus was that Congress had not addressed the scope of the abortion ban in section 1008. See, e.g., *Massachusetts v. Sullivan*, 899 F.2d 53, 58-61 (1st Cir. 1990); *Planned Parenthood v. Sullivan*, 913 F.2d 1492, 1497 (10th Cir. 1990); *New York v. Sullivan*, 889 F.2d 401, 407 (2d Cir. 1989) (all agreeing that Congress had not addressed the scope of the abortion prohibition).

213. *Rust* 111 S. Ct. at 1768-69. See *supra* notes 51-52 and accompanying text for a discussion on the requirement of separate facilities.

or no deference because they abandoned the historical application of section 1008 which allowed, and in fact required, nondirective abortion counseling.<sup>214</sup> However, the Supreme Court addressed this specific point in *Chevron*, and rejected Dr. Rust's position based on the principle that an agency's interpretation is not penalized even when "it represents a sharp break with prior interpretation" of the statute in question."<sup>215</sup> *Chevron* had been interpreted, perhaps incorrectly, to mean that less deference would be given an agency's interpretation when a regulation was new or deviated from prior construction.<sup>216</sup> An extraneous result of the *Rust v. Sullivan* decision is that it obviates the inclination to give new regulations, or novel interpretations of regulations, less deference.<sup>217</sup>

The Supreme Court did not address the question of agency bias in determining that the Secretary's interpretation deserved substantial deference.<sup>218</sup> The 1988 regulations were promulgated at the urging of the Reagan administration.<sup>219</sup> In a political system where different parties control the executive and legislative branches, an agency regulation written at the request of the executive branch is prone to reflect the administration's intent and not necessarily the intent of Congress. In such instances, one must question the logic behind concluding that the agency is better able than the judiciary to interpret congressional intent.<sup>220</sup>

In *Rust v. Sullivan*, the Court found that the Secretary had explained the change in the interpretation of Title X regarding the ban on abortion counseling and referral with a "reasoned analysis."<sup>221</sup> In

---

214. Brief for Petitioners, at 20, in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1392). See also *supra* note 39 and accompanying text.

215. *Rust*, 111 S. Ct. at 1769 (quoting *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984)).

216. See, e.g., Sunstein, *supra* note 206, at 2101-02 (stating that new regulations or new interpretations of regulations receive less deference). However, Sunstein asserts that it is an incorrect application of *Chevron* to give new interpretations of regulations less deference. *Id.* at 2102. The intent behind the *Chevron* decision was to eliminate strict adherence to the past and allow flexibility for the law to change with the times. *Id.*

217. Compare *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990) (holding that once the Court has affirmed an agency interpretation of a statute, the agency cannot reinterpret the statute even if there is a change of circumstances); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (propounding that where Congress reenacts a statute without pertinent change, then the historical administrative interpretation is deemed evidence of Congressional intent) with *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); and *Motor Vehicle Mfrs. Ass'n. of United States v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (stating that an agency's rules need not last forever).

218. Sunstein, *supra* note 206, at 2101 (explaining that in cases where an agency's interpretation "predictably lines up with agency self-interest or bias," deference should not be applied).

219. See *supra* note 35.

220. Sunstein, *supra* note 206, at 2101.

221. *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991).

reaching this conclusion, the Court considered the reports from the General Accounting Office and the Office of the Inspector General, which indicated that the agency had not successfully presented its view on the scope of the abortion ban.<sup>222</sup> Further, the Court found "sufficient" the Secretary's statement that the public attitude had shifted against "elimination of unborn children by abortion."<sup>223</sup>

The Court specifically addressed the 1988 requirement that clinics receiving Title X grants maintain separate personnel, records, and facilities from any abortion related activity.<sup>224</sup> The Secretary proposed that the separation requirements were necessary to ensure that abortion was not advanced as a family planning alternative.<sup>225</sup> Justice Rehnquist found Congress clear on this point,<sup>226</sup> and concluded that Congress intended to separate Title X funds from abortion-related funds.<sup>227</sup> The Court deferred to the Secretary in determining that the separate facilities requirement was not unreasonable and was necessary to achieve the goal of section 1008.<sup>228</sup>

*b. The Regulations Do Not Raise Grave Constitutional Concerns*

Justice Rehnquist summarily dismissed the proposition that the 1988 regulations raised "serious questions of constitutional law."<sup>229</sup> The dissenting Justices disagreed with this conclusion.<sup>230</sup> The majority conceded that some constitutional questions were raised by the

222. See *supra* notes 28-31 and accompanying text.

223. *Rust*, 111 S. Ct. at 1769. The Secretary's authority for this conclusion is not mentioned. While one may easily accept that a majority of the country finds the killing of unborn children repugnant, this begs the issue of *Rust v. Sullivan*. *Rust* is not a challenge to the abortion right established in *Roe v. Wade*, but rather a question of how far the government can go to promote or impede a woman's access to abortion. There are ample surveys and polls to support the contention that a majority continue to support a woman's right to decide whether or not to bear a child. See Farber & Nowak, *supra* note 175 at 536 n.89. In 1989, only 17% of those polled favored a complete ban on abortion. *Id.* After the *Webster* decision, 68% stated "that even in cases where they might think abortion is wrong, the government has no business preventing a woman from having an abortion." *Id.* (quoting N.Y. TIMES, Aug. 3, 1989, at A18).

224. 42 C.F.R. § 59.9.

225. 53 Fed. Reg. 2940 (1988).

226. *Rust*, 111 S. Ct. at 1770.

227. *Id.*

228. *Id.* Justice Rehnquist did not address the consequences on the 4,000 Title X grantees. See *supra* note 71.

229. *Rust*, 111 S. Ct. at 1771. The majority decision agrees with established law that a federal statute should be construed to avoid serious constitutional questions. See *Machinists v. Street*, 367 U.S. 740, 749 (1961) (construction of a section of Railway Labor Act requiring "'financial support'" of collective bargaining units).

230. *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting in which Marshall, J., and O'Connor, J., join in this part).

regulations, but the questions were not so “grave and doubtful” to conclude that Congress did not authorize the construction.<sup>231</sup> Justice Rehnquist indicated that the majority was disinclined to give more than passing consideration to the constitutional issue by remarking that any set of regulations more restrictive than the existing regulations “would be challenged on constitutional grounds.”<sup>232</sup>

#### i. First Amendment Issues

One of the most serious questions raised in *Rust v. Sullivan* is the extent to which government can promote or discriminate against a view through financial subsidies.<sup>233</sup> Entangled in this debate is the doctor-patient relationship, a Title X client’s right to be informed of abortion options, and the clinic employee’s right to discuss abortion in the context of his or her employment.<sup>234</sup>

Dr. Rust posited that the 1988 regulations amounted to impermissible viewpoint discrimination because they precluded lawful information about abortion as an option while promoting information about continuing pregnancy.<sup>235</sup> Consequently, the petitioners contended, the new regulations infringed on the First Amendment rights of Title X clients and staff.<sup>236</sup> Dr. Rust based his argument on the statement in *Regan v. Taxation With Representation of Washington*,<sup>237</sup> that the government may not manipulate subsidies in order to achieve “‘the suppression of dangerous ideas’.”<sup>238</sup> The current administration has clearly stated that it does not support abortion.<sup>239</sup> Dr. Rust was likely correct in his assessment that the administration perceived abortion as a “dangerous idea.”<sup>240</sup>

The petitioners faced an uphill battle when framing the argument in the context of abortion funding.<sup>241</sup> Justice Rehnquist dismissed the constitutional attack with the simple statement that “[t]here is no question but that the statutory prohibition contained in [section] 1008

---

231. *Rust*, 111 S. Ct. at 1771 (citing *United States v. Delaware and Hudson Co.*, 213 U.S. 366 (1909)).

232. *Id.* at 1771.

233. See *supra* notes 107-128 and accompanying text.

234. See *infra* notes 361-383 and accompanying text.

235. Brief for Petitioners at 11, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), (No. 89-1391).

236. *Id.*

237. 461 U.S. 540 (1983).

238. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

239. See, e.g., *Bush Says Compromise May Be Possible on Abortion Bill*, UPI, July 11, 1991, available in LEXIS, Nexis Library, UPI File (stating that Bush would not change his fundamental position against abortion).

240. See Brief for Petitioners at 12, *Rust v. Sullivan* 111 S. Ct. 1759 (1991) (No. 89-1391).

241. See *supra* notes 160-162 and accompanying text.

is constitutional."<sup>242</sup> The Court has been clear in its assessment that the "government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'"<sup>243</sup>

Justice Rehnquist reiterated that the government does not violate the Constitution by promoting activities which the government decides are in the best interest of the public, even when that results in the nonfunding of activities that support an opposite viewpoint.<sup>244</sup> Further, he asserted that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>245</sup>

*Rust v. Sullivan* brings the Court's abortion funding decisions to a new level, entangling abortion funding with First Amendment protection of free speech.<sup>246</sup> In previous decisions the Supreme Court has been skeptical of government conditions involving First Amendment protections. The Court struck down a ban on editorials by publicly funded radio stations,<sup>247</sup> denied a tax on general interest magazines that violated the First Amendment by discriminating against a small group of magazines,<sup>248</sup> and invalidated a law that banned one type of peaceful picketing while allowing another.<sup>249</sup> In upholding the ban on abortion counseling, referral and activism, all which must be considered First Amendment activities, the Court did not attempt to explain why the previous line of cases were not appro-

---

242. *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991).

243. *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

244. *Id.*

245. *Id.* (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983)). Pro-choice activists may find some solace from the Chief Justice's choice of quotes if it can be inferred that abortion is deemed a fundamental right. See *supra* notes 165-178 and accompanying text.

246. *Supra* notes 44-58 and 132.

247. See *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (invalidating an editorial ban that singled out particular speakers and prevented them from communicating with a selected audience). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that there is a "profound national commitment . . . that debate on public issues should be uninhibited, robust and wide-open").

248. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). *Arkansas Writers' Project* involved an Arkansas tax on general interest magazines that exempted newspapers and religious, professional, trade and sports journals. *Id.* at 224. Justice Marshall, writing for the majority, found that the discriminatory tax burdened the rights guaranteed under the First Amendment, even though there was no "improper censorial motive." *Id.* at 227-29.

249. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). *Mosley* presented both the first and fourteenth amendment issues. *Id.* at 95-96. *Mosley* stands for the proposition that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96.



priate in *Rust v. Sullivan*; rather, it stated that petitioner's reliance on these cases was misplaced.<sup>250</sup> Justice Rehnquist rationalized that the Court was not impeding a group's activities on the basis of speech, but merely refusing to fund certain activities that tangentially included speech.<sup>251</sup>

It is difficult to align the Title X ban on abortion counseling and referral with the Supreme Court's decision in *Perry v. Sinderman*,<sup>252</sup> if one takes at face value the statement that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interests in freedom of speech.<sup>253</sup> There is no question that a Title X clinic loses the benefits of Title X funds if the staff engages in the prohibited speech.<sup>254</sup> The majority adopted the position that the new regulations did not constrain a benefit at all, but instead the regulations “insist[] that public funds be spent for the purpose for which they were authorized.”<sup>255</sup> While it may seem clear to the majority that the “purpose” did not include abortion counseling and referral, the history of Title X and its eighteen years of application prior to the new guidelines suggest that the purpose for which the funds were authorized likely included abortion counseling and referral.<sup>256</sup>

The majority opined that a law is constitutional if it simply inhibits a constitutionally protected right in a limited context, while leaving that right unaffected in another context.<sup>257</sup> The Title X speech ban impacts the Title X clinic and its staff only in the context of clinic activity, and does not preclude the Title X grantee from engaging in abortion-related activities provided such activities are not connected with a Title X program.<sup>258</sup> In one fell swoop the majority dismissed the contention that the regulations impose an unconstitutional condition by highlighting that the Title X grantee and the Title X staff have other choices.<sup>259</sup>

The majority opinion was not concerned with the fact that the new

---

250. *Rust v. Sullivan*, 111 S. Ct. 1759, at 1773 (1991).

251. *Id.* at 1773.

252. 408 U.S. 593 (1972).

253. *Id.* at 597.

254. See *supra* notes 43-58 and accompanying text.

255. *Rust v. Sullivan*, 111 S. Ct. 1759, 1773 (1991).

256. See *supra* notes 13-34 and accompanying text. See, e.g., *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 58-59 (1st Cir. 1990) (finding the legislative history inconclusive).

257. *Rust*, 111 S. Ct. at 1773.

258. *Id.* at 1774. See also *Regan v. Taxation Without Representation*, 461 U.S. 540, 546 (1983) (deciding that Congress did not impede first amendment rights by refusing to fund lobbying activities).

259. *Rust*, 111 S. Ct. at 1774. See, e.g., *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (teaching that first amendment rights are not violated where giving up the federal funds eliminates the condition).

regulations restricted not only Title X funds, but other matching funds and grant-related income.<sup>260</sup> The solution, on its face, is simple: If the clinic does not like the conditions, it can forego the federal funds.<sup>261</sup> Further, a Title X clinic is not constrained from using wholly private funds to finance abortion related activities outside of Title X program.<sup>262</sup> Therefore, a Title X recipient who chooses to continue accepting Title X funds impliedly consents to the restrictions on all funds.<sup>263</sup>

Justice Rehnquist acknowledged that allowing the fund recipient an alternate avenue to present his or her ideas is not always adequate to justify government control attached to funding.<sup>264</sup> In *United States v. Kokinda*,<sup>265</sup> the Court postulated that the government need only a reasonable basis to restrict activity protected by the First Amendment when the forum was not traditionally used as a public forum "dedicated . . . to First Amendment activity."<sup>266</sup> Conversely, the government cannot control speech through funding where the forum is a "traditional sphere of free expression."<sup>267</sup> In *Rust v. Sullivan*, Justice Rehnquist suggested that the doctor-patient relationship could be considered a traditional sphere, meriting the same protection as a university.<sup>268</sup> However, the Court declined to carry the discussion further, finding instead that the Title X regulations did not "significantly impinge upon the doctor-patient relationship."<sup>269</sup>

A number of doctors disagreed with the majority conclusion.<sup>270</sup> The Secretary suggested that if a doctor is queried about abortion, he or she should respond that abortion is not considered an acceptable

---

260. See *supra* notes 59-61 and accompanying text.

261. *Rust*, 111 S. Ct. at 1775.

262. *Id.*

263. *Id.* n.5.

264. *Id.* at 1776.

265. 110 S. Ct. 3115 (1990).

266. *Id.* at 3116. *Kokinda* involved a group of political activists who had been convicted under a criminal statute for soliciting on postal premises. The activists set up a table on the sidewalk leading into a post office. Justice O'Connor, writing for the majority, stated that the postal premises were not a traditional forum for public speech, and government ownership of property did not "automatically open that property to the public." *Id.* at 3119 (citations omitted). The government's prohibition of the activists' use of the property was decided using a reasonable test instead of the more stringent strict scrutiny. *Id.* at 3121-22.

267. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (explaining that a university constitutes a traditional sphere and finding unconstitutional a statute making treasonable or seditious words or acts grounds for removal from university employ).

268. *Rust*, 111 S. Ct. at 1776.

269. *Id.*

270. See *infra* notes 375-76.

option for family planning.<sup>271</sup> The doctor was precluded from discussing abortion as an option, even if the doctor determined that an abortion was medically preferable to carrying the child to term.<sup>272</sup> The Bush Administration recently lifted the strict ban on doctor-patient abortion dialogue.<sup>273</sup> However, other clinic professionals remain under the ban on abortion counseling and referral.<sup>274</sup>

## ii. Privacy Issues

*Roe v. Wade* was the landmark decision for affirming a woman's privacy right in decisions affecting her own body.<sup>275</sup> The Court reaffirmed that right when it stated that the government could not obstruct the decision of a woman on whether to obtain an abortion.<sup>276</sup> Government interference was declared excessive when the State required physician disclosure or consent provisions that were slanted to encourage a woman to choose childbirth over abortion.<sup>277</sup>

The majority opinion restated the proposition that government has no duty to provide access to abortion simply because the right to abortion is constitutionally protected.<sup>278</sup> It is a short step to extend that rationale to the notion that the government is under no duty to inform a woman about her right to an abortion simply because that right is constitutionally protected.

Justice Rehnquist dismissed the argument that the regulations violate a woman's Fifth Amendment rights with the conclusion that "[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the government had not enacted Title X."<sup>279</sup> The Court appears to distinguish between an active impediment, such as that found in *Thornburgh v. American Col-*

---

271. 42 C.F.R. § 59.8(b)(5).

272. Only in a medical emergency can a patient be referred to an emergency care facility without regard as to whether or not the facility also provides abortions. Otherwise the doctor is limited to providing a list of health care providers that meet the requirement of Title X. 42 C.F.R. § 59.8(a)(2)(1991).

273. David G. Savage, *U.S. Modifies Abortion-Advice Rules for Clinics*, L.A. TIMES, March 21, 1992, at A-1.

274. *Id.*

275. *Roe v. Wade*, 410 U.S. 113 (1973). See *TRIBE*, *supra* note 77, at 1341.

276. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428-30 (1983). *Akron* invalidated a law that required informed consent provisions designed to influence a woman's choice between childbirth and abortion. *Id.* See also *Roe*, 410 U.S. at 119.

277. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 766 (1986); *Akron*, 462 U.S. at 442-49.

278. *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991). Following the path begun in *Maher*, the Court simply extended the principle that Congress has no affirmative duty to subsidize one activity even to the exclusion of another. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989).

279. *Rust*, 111 S. Ct. at 1777.

*lege of Obstetricians and Gynecologists*,<sup>280</sup> where a State law required a physician to provide information discouraging abortion,<sup>281</sup> and a passive impediment, such as regulations requiring a physician's silence on abortion.

Justice Rehnquist distinguished *Thornburgh* and *Akron*, commenting that the invalidated laws in those cases required a physician to provide patients contemplating an abortion with certain information, regardless of whether the physician thought the information necessary.<sup>282</sup> On the other hand, he believed that the Title X regulations did not impact a woman's ability to receive outside information about abortion.<sup>283</sup> While conceding that "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project,"<sup>284</sup> the Court noted that the government is not compelled to simplify obtaining an abortion.<sup>285</sup>

The majority's discussion of the right to privacy is brief, to the point, and even more curious for its lack of depth and explanation.

*Rust v. Sullivan* is important not only for its impact on constitutional issues but also for its insight into the inclination of the Court. *Rust v. Sullivan* was the public's first opportunity to discover how Justice Souter, the Court's newest Justice at that time, would decide

280. 476 U.S. 747 (1986).

281. Pennsylvania's Abortion Control Act imposed impermissible abortion restraints by requiring a woman's informed consent include several mandatory disclosures. Specifically, the statute stated that the woman must be advised 24 hours before such consent of the name of the doctor performing the abortion; informed that there could be "detrimental physical and psychological effects," of the medical risks involved; told of the "gestational age"; and notified of the medical risks of carrying the child to term. *Thornburgh*, 476 U.S. at 760-61. Further, the act required the woman be informed that:

There are many public and private agencies willing and able to help you to carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place him or her for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion.

*Id.* at 761. The Court held that the information was an "intrusive informational prescription[]" designed to discourage abortion through the "informed-consent dialogue between the woman and her physician." *Id.* at 762.

282. *Rust*, 111 S. Ct. at 1777.

283. *Id.*

284. *Id.*

285. *Id.* at 1778. See, e.g., *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris V. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

on abortion issues.<sup>286</sup> Justice Souter joined the majority and provided the swing vote.<sup>287</sup>

### C. *The Dissenting Opinions*

*Rust v. Sullivan* produced three separate dissenting opinions.<sup>288</sup> Justice Blackmun filed the most analytical dissent and garnered the concurrence of Justice Marshall and, in part, Justices O'Connor and Stevens.

#### 1. The Regulations do Raise Grave Constitutional Issues

Justice Blackmun first attacked the majority decision for "unnecessarily pass[ing] upon important questions of constitutional law."<sup>289</sup> It is well established that "federal statutes are to be so construed as to avoid serious doubt of their constitutionality."<sup>290</sup> The majority opinion dismisses such doubts by stating the regulations do not raise doubts of sufficient gravity to suggest they were not intended by Congress.<sup>291</sup>

Justice Blackmun asserted that the language of section 1008 which says that "[n]one of the funds . . . shall be used in programs where abortion is a method of family planning"<sup>292</sup> is capable of a Constitutional interpretation.<sup>293</sup> That interpretation would have limited the prohibition of Title X funds to the act of performing an abortion and would not have extended the prohibition to the protected area of speech.<sup>294</sup> The dissent persuasively reasoned that the Court is duty bound to avoid unnecessarily deciding constitutional questions where Congress' intent is ambiguous, and is further bound to leave open the questions until Congress tests the constitutional limits by explicitly

---

286. *Forbidden Advice*, WASH. POST, May 24, 1991, at A22; Daniel Wise, *Ban on Abortion Counseling Sustained*, N.Y.L.J., May 24, 1991, at 1.

287. The Supreme Court achieved a conservative majority when Justice Souter replaced Justice Brennan, who was a *Roe v. Wade* proponent. David O. Stewart, *The Great Persuader*, A.B.A. J., November, 1990 at 58. With the retirement of Justice Marshall, another *Roe v. Wade* supporter, and the appointment of Clarence Thomas, the Court needs only the right case to reconsider *Roe v. Wade*. See *infra* notes 396-400 and accompanying text. See also *Marching to a Different Drummer*, TIME, July 15, 1991, at 18, 21.

288. Dissents were filed by Justices Blackmun, joined by Justice Marshall, joined in part I by Justice O'Connor, and joined in parts II and III by justice Stevens. Justices O'Connor and Stevens each filed a separate dissent.

289. *Rust*, 111 S. Ct. at 1778 (Blackmun, J., dissenting).

290. *Id.* at 1778 (Blackmun, J., dissenting) (citing *Machinists v. Street*, 367 U.S. 740, 749 (1961)). See, e.g., *United States v. Moy*, 241 U.S. 394, 401 (1916) (stating "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score").

291. *Id.* at 1771.

292. 42 U.S.C. § 300a-6 (1984).

293. *Rust*, 111 S. Ct. at 1779 (Blackmun, J., dissenting).

294. *Id.* at 1779 n.1.

expressing its intent.<sup>295</sup>

Justice O'Connor analyzed the issue similar to Justice Blackmun and would have invalidated the regulations because they raised "serious First Amendment concerns."<sup>296</sup> Justice O'Connor agreed that the legislative history shed no light on Congress' intended reach of the section 1008 ban on the use of Title X funds.<sup>297</sup> She reiterated that where Congressional intent is not clearly to the contrary, then the Court should construe a statute to avoid "serious constitutional problems."<sup>298</sup> Justice O'Connor declined to address the First and Fifth Amendment issues raised by the Secretary's new regulations.<sup>299</sup> The majority decision, in effect, validates legislation before it is enacted by reaching the constitutional issues in the context of congressional ambiguity.

Justice Stevens, alone, took the position that the section 1008 ban on use of Title X funds is clearly a restriction on conduct and not on speech.<sup>300</sup> Stevens put forth the argument that because the statute had been interpreted using the plain language of the statute for the previous eighteen years, the inference indicated that the Secretary was not authorized to censor speech and he would hold the regulations invalid.<sup>301</sup> Justice Stevens agreed with Justice O'Connor's conclusion that the Secretary's new regulations were an unconstitutional construction if the statute is indeed ambiguous.<sup>302</sup> However, Justice Stevens was then compelled to rebut the majority's analysis of the constitutional issues and concurred with Justice Blackmun's analysis.<sup>303</sup> This analysis is discussed next in this note.

---

295. *Id.* at 1779 (Blackmun, J., dissenting). Professor Sunstein appears to support Justice Blackmun's statements when he suggests that agency interpretation should not be given deference where constitutional doubts exist. See Sunstein, *supra* note 206, at 2113.

296. *Rust*, 111 S. Ct. at 1789 (O'Connor, J., dissenting).

297. See *supra* notes 15-36 and accompanying text.

298. *Rust*, 111 S. Ct. at 1788 (O'Connor, J., dissenting) (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Justice O'Connor would have told the Secretary that his interpretation was not reasonable, thus allowing Congress to take up the battle if it so elected. *Id.* at 1789 (O'Connor, J., dissenting).

299. *Id.* at 1789 (O'Connor, J., dissenting).

300. *Id.* at 1787 (Stevens, J., dissenting).

301. *Id.* at 1788 (Stevens, J., dissenting). "In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech." *Id.* (Stevens, J., dissenting)

302. *Id.* at 1788 (Stevens, J., dissenting).

303. *Id.* (Stevens, J., dissenting).

## 2. The Regulations Impermissably Infringe on First Amendment Rights

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech.<sup>304</sup>

The Court's opinions are replete with the sentiment that viewpoint discrimination is antithetical to the First Amendment.<sup>305</sup> The Court has excepted this rule when the law at issue was deemed content-neutral,<sup>306</sup> but has been disinclined to uphold a content-based regulation.<sup>307</sup> Justice Blackmun declared that the abortion-related speech restriction is clearly content-based because it targets only counseling and referral about abortion, while allowing counseling and referral about other options.<sup>308</sup> He believed that the regulation's proscription of abortion advocacy necessarily produced the same conclusion.<sup>309</sup>

Justice Blackmun denigrated the majority's rationale that the government has "merely chosen to fund one activity to the exclusion of another,"<sup>310</sup> and thus avoided the tag of viewpoint discrimination. He announced that the majority had exceeded its boundaries by "manipulating the content of the doctor/patient dialogue,"<sup>311</sup> and creating an environment where the Title X employees are required to foster a particular view about abortion.<sup>312</sup> Justice Blackmun was unpersuaded by the assertion that a Title X employee accepts the speech restriction as a consequence of employment at a Title X clinic.<sup>313</sup> He believed that the government simply does not have the option to require an employee to forfeit his or her First Amendment rights as a condition of employment.<sup>314</sup>

---

304. *Id.* at 1780 (Blackmun, J., dissenting) (citations omitted).

305. *See, e.g.,* *Boos v. Barry*, 485 U.S. 312 (1988) (allowing display of anti-government signs near a foreign embassy); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating a discriminatory picketing regulation); *Speiser v. Randall*, 357 U.S. 513 (1958) (striking a tax code that required taking a loyalty oath to receive a property tax exemption).

306. *See supra* notes 101-104 and accompanying text.

307. *See supra* notes 95-100 and accompanying text.

308. *Rust*, 111 S. Ct. at 1781 (Blackmun, J., dissenting).

309. *Id.* (Blackmun, J., dissenting)

310. *Id.* at 1772.

311. *Id.* at 1782 (Blackmun, J., dissenting).

312. *Id.* (Blackmun, J., dissenting) *See, e.g.,* *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977) (holding that requiring citizens to use license plates with the motto "Live Free or Die" unconstitutionally fostered an ideological message).

313. *Rust* 111 S. Ct. at 1782 (Blackmun, J. dissenting).

314. *Id.* (Blackmun, J., dissenting). Justice Blackmun relies on the Court's holding in *Abod v. Detroit Board of Education*, 431 U.S. 209, 234 (1977) (stating "that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"). *See also* *Rankin v. McPherson*

Justice Blackmun proposed that the regulations would not have passed constitutional muster if the Court balanced the Title X project employee's interest in discussing abortion against the government's interest in preventing dissemination of abortion information.<sup>315</sup> The Title X physician has an ethical responsibility to provide patients with complete information about medical options.<sup>316</sup> On the other hand, the government had other options less radical than the abridgement of speech to ensure that section 1008 was upheld.<sup>317</sup> According to Justice Blackmun, the majority, however, did not consider the regulations to be an abridgement of free speech, and therefore never looked at a balancing approach.<sup>318</sup>

### 3. The Regulations are an Impermissible Restriction of Privacy Rights

Justice Blackmun perceived the majority opinion as a direct affront to a woman's privacy rights extended to her by *Roe v. Wade*.<sup>319</sup> That right is "the right . . . to be free from affirmative governmental interference in her decision" whether or not to carry a child to term.<sup>320</sup> Contrary to the majority's conclusion that the regulations do not impose any additional burden on a woman's ability to obtain an abortion,<sup>321</sup> Justice Blackmun concluded that by virtue of the respect most patients accord a physician, the physicians incomplete information creates considerable obstacles that prevent a woman from obtaining a legal abortion.<sup>322</sup> "For these women, the Government will have obliterated the freedom to choose as surely as if it had

---

son, 483 U.S. 378 (1987) (holding that a county employee could not be discharged for remarks made during the working hours against the President).

315. *Rust*, 111 S. Ct. at 1783 (Blackmun J., dissenting).

316. See *infra* note 374.

317. *Rust* 111 S. Ct. at 1783-84 (Blackmun, J., dissenting). For instance, the government could have implemented more stringent bookkeeping requirements "or adopt[ed] content-neutral rules for the balanced dissemination of family-planning and health information." *Id.* at 1784 (Blackmun, J., dissenting).

318. *Id.* (Blackmun, J., dissenting) See *supra* notes 233-242, 257-263 and accompanying text.

319. 410 U.S. 113 (1973). See *supra* notes 162-178 and accompanying text.

320. *Rust*, 111 S. Ct. at 1784 (Blackmun, J., dissenting).

321. See *supra* notes 275-86 and accompanying text.

322. *Id.* at 1785 (Blackmun, J., dissenting). The Justice reasons:

[T]he Title X client will reasonably construe [the physician's words] as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the Regulation's mandatory prenatal referral, will be prevented



banned abortion outright."<sup>323</sup>

## V. IMPACT

"It is never so difficult to speak as when we are ashamed of our silence."<sup>324</sup>

"There is a fundamental difference between the prevention of conception and the destruction of human life."<sup>325</sup>

*Rust v. Sullivan* resulted in a firestorm of opponents and proponents who emphasize the aspect of the decision that best suits their cause. Opponents attack the decision for its impact on the rights of free speech and privacy, while proponents exalt the decision for its impact on abortion.

Regardless of the viewpoint one takes, it is undisputed that the decision generated an enormous amount of political and social debate.<sup>326</sup> The debate culminated in a Congressional battle that failed to overturn the restrictions in federally funded family planning clinics upheld by the *Rust v. Sullivan* majority.<sup>327</sup>

### A. New Boundaries for Federal Funding

There is a well-articulated policy against federal funding for abortions.<sup>328</sup> The *Rust* majority construed the Title X ban on abortion counseling, referral and political activism as an extension of that established policy.<sup>329</sup> If a Title X clinic is adverse to the conditions attached to the funds, it may choose to decline the federal funds and continue the forbidden activities.<sup>330</sup> Such a simple solution created such complex controversy.

---

from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

Id. (Blackmun, J., dissenting)

323. Id. (Blackmun, J., dissenting)

324. DUC FRANCOIS DE LA ROCHEFOUCAULD, *MAXIMS* (quoted in *DICTIONARY OF QUOTATIONS* 630 (1968)).

325. 116 CONG. REC. 37,375-79 (1970) (remarks of Rep. Dingell).

326. A poll taken in California showed that 76 percent of the people polled knew about the *Rust v. Sullivan* decision. Of those who knew about the ruling, 70 percent disagreed with the Supreme Court's decision. The poll queried 605 adults during the period May 30, 1991 to June 10, 1991. Susan Yoachan, *Majority Supports Abortion Rights*, SAN. FRAN. CHRON., June 20, 1991, at A2.

327. See William J. Eaton, *House Sustains Bush's Abortion Counseling Ban*, L.A. TIMES, Nov. 20, 1991, at A1. The House was successful in presenting legislation that would overturn the ban on abortion counseling and referral, but was unable to garner enough votes to override the President's veto of the bill. Id.

328. See *supra* notes 130-152 and accompanying text. On August 17, 1991, President Bush vetoed a bill granting the District of Columbia federal funds because the legislation allowed the city to "finance abortions for poor women." John E. Yang & Rene Sanchez, *District Funding Bill Vetoed; Bush Cites Abortion in Rejecting Plan*, WASH. POST, Aug. 18, 1991, at B1.

329. See *supra* notes 246-251 and accompanying text.

330. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 n.5 (1991). See also Presser & Presser, *Sending a Message*, A.B.A. J. 32 (Aug. 1991).

*Rust v. Sullivan* marks the first time the Court impacted the abortion debate through the distribution of federal funds.<sup>331</sup> Moreover, the decision may be the first time the Court upheld a regulation that permits viewpoint discrimination through the allocation of federal funds.<sup>332</sup> Prior to *Rust v. Sullivan*, the Court took the stand that "ideological viewpoint is a . . . repugnant ground upon which to base funding decisions."<sup>333</sup> The majority decision justified the result by rationalizing that "the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."<sup>334</sup> But in this case, the activity encompasses speech previously protected under the First Amendment. Subsequently, the boundaries for conditional government funding are hazier.

The government finances about half of the nation's medical costs.<sup>335</sup> *Rust v. Sullivan* opens the doors for government regulation within the medical community, but outside the abortion arena, through the grant or denial of federal funds.<sup>336</sup> When faced with complying with the regulations or forfeiting federal funds, the autonomous medical community conceivably will choose the latter, and subsequently reduce the medical care facilities that are open to the indigent.<sup>337</sup>

Some interpret the ramifications of *Rust v. Sullivan* as placing all

331. See *supra* notes 130-162 and accompanying text.

332. *Rust*, 111 S. Ct. at 1780 (Blackmun, J., dissenting). "By refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint." *Id.* at 1781 (Blackmun, J., dissenting) (emphasis in original).

333. See *id.* at 1782 (Blackmun, J., dissenting). The government faces a tougher battle in imposing speech restrictions outside the realm of federal funding. See *supra* notes 87-128 and accompanying text. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court applied the policy that government could only restrict protected speech if the restriction was "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leaves open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-violence*, 468 U.S. 282, 293 (1984)).

334. *Rust*, 111 S. Ct. at 1772.

335. M. Gregg Bloche, *Mandating Medical Deceit*, WASH. POST, July 9, 1991 at A19 (stating that *Rust v. Sullivan* "gave the federal government constitutional authority to mandate medical deceit whenever it pays for medical services").

336. *Id.*

337. *Id.* Dr. Bloche suggests that if government mandates that doctors mislead their patients to promote a government view, the doctors may rebel and "the political door to expanded public financing of care for the poor may close as doctors and hospitals contemplate the invasive regulation that federal funding could bring." *Id.*

federally funded programs at risk.<sup>338</sup> If the government is permitted to promote a specific viewpoint through federal funding, then the government can "constitutionally determine what is said."<sup>339</sup> Even more extreme is the sentiment that federally funded programs create "coercion at best, prostitution at worst."<sup>340</sup> *Rust v. Sullivan* advances the idea that "when federal money is involved, the government's authority to advance a particular social interest outweighs First Amendment protections."<sup>341</sup>

*Rust v. Sullivan* reinforces the legal segment who asserts that government can write the script when they are paying for the production.<sup>342</sup> Government has never been required to finance views of factions that disagree with the administration's position on a specific topic.<sup>343</sup> However, *Rust v. Sullivan* does not neatly fit into this arguably acceptable area. *Rust v. Sullivan* is more analogous to the silencing of an unpopular idea—a concept inapposite to the right to free speech granted under the First Amendment. On the heels of the Court's decision, Michigan passed a similar funding restriction.<sup>344</sup>

---

338. Martha Kuhlman, *Rust Ruling Endangers First Amendment*, LEGAL TIMES, August 5, 1991, at 34.

339. *Id.* (quoting Deputy Ass't Attorney General Leslie Southwick). In fact, Ms. Kuhlman points to the information that "some librarians have been pressured to remove books containing information on abortion." *Id.* The United States Solicitor General Kenneth W. Starr is credited with remarking that "[t]he government is able to take sides; it is able to have viewpoints when it is funding. It can choose to fund Shakespeare and decline to fund Moliere." See Ruth Marcus, *Abortion - Advice Ban Upheld For Federally Funded Clinics*, WASH. POST, May 24, 1991 at A1.

340. Gary McDowell, *The Wrong Approach to Tort Reform*, TEX. LAW., August 5, 1991, at 17. Professor McDowell addresses the administration's attempt to regulate the medical malpractice costs through the proposed Health Care Liability Reform and Quality of Care Improvement Act, which would penalize a state for not meeting federal guidelines by eliminating some federal payments under Medicare and Medicaid. *Id.*

A similar view is that the federal funding impact from *Rust v. Sullivan* results in "legalized bribery." Bella English, *Gag Dangerous as a Precedent*, BOSTON GLOBE, July 10, 1991, at 17.

341. Joe Patrick Bean, *Trouble Ahead for First Amendment*, CHRISTIAN SCIENCE MONITOR, July 8, 1991, at 18. See also Marilyn Goldstein, *Riding the 'A' Train of Thought*, NEWSDAY, July 12, 1991, at 6 (suggesting, tongue in cheek, that the government could restrain bankruptcy advice, tax advice, etc., based on a particular point of view).

If one accepts the premise that the new Title X regulations were at least in part promulgated as a result of anti-abortion sentiments, then *Rust v. Sullivan* empowers well-funded, vocal or well-organized lobbies to control information through government funding. Faye Wattleton, address to The National Press Club (June 16, 1991) (published by Federal News Service), available in LEXIS, Nexis Library, Currnt File.

342. Mark N. Troobnick, *Free Speech and Abortion: High Court is Right on the Money*, NEWSDAY, June 4, 1991 at 97.

343. *Id.* For instance, the government does not have to provide radio space on the Voice of America to dissident factions. *Id.*

344. See, e.g., *Michigan to End Tax-Funded Abortion Counseling*, Newswire, June 4, 1991 (financial news), available in LEXIS, Nexis Library, Currnt File. The Michigan policy to cease state funding of clinics that forego the federal funds and continue to

One may expect those states with strong anti-abortion sentiments to follow suit and deny state funds to family planning clinics who counsel or refer for abortion.

### B. *Changes in Family Planning*

The impact of *Rust v. Sullivan* will be felt most profoundly in the area of family planning, whether it be in the family planning clinics, or on the family planning clients.

Immediately after the announcement of the *Rust v. Sullivan* decision, clinics around the country announced their intent to give up their Title X federal funds and continue to provide abortion counseling and referral.<sup>345</sup> In some cases, the state and local governments rallied behind the clinics with promises of increased state, local and private support.<sup>346</sup> However, at other clinics, choosing to forego federal funds or to comply with the regulations results in an economic hardship that impacts the quality of care provided<sup>347</sup> or the continued existence of the clinic itself.<sup>348</sup> Thus, for some women the choice will be fewer clinics or poorer care.

---

provide abortion counseling and referral was heralded by the pro-life organization, "Right to Life of Michigan". *Id.*

345. Nadine Brozan, *Some Clinics Plan to Advise and Forego Aid*, N.Y. TIMES, May 24, 1991, at A1. Those clinics that intend to give up the Title X funds include clinics in the South Bronx, New York, Vermont and California, and Planned Parenthood of Greater Iowa. *Id.* See also Amy Goldstein, *Ruling Sows Distrust, D.C. Area Clinics Say; Some May Forego Funding*, WASH. POST, May 24, 1991, at A1; John H. Kennedy, *Fiscal, Ethical Choices Face Counselors*, BOSTON GLOBE, May 24, 1991, at 26.

346. See, e.g., Daniel M. Weintraub, *Wilson Disagrees With Ruling on Abortion*, L.A. TIMES, May 25, 1991, at A1; *Florio Calls Abortion Rights Meeting*, U.P.I., May 24, 1991 (Regional News) (N.J. and N.Y. Metro), available in LEXIS, Nexis Library, UPI File; *Proposed Legislation Would Aid New Jersey Family Planning Clinics*, U.P.I., May 29, 1991 (Regional News) (N.J. and N.Y. Metro), available in LEXIS, Nexis Library, UPI File.

347. See, e.g., Elaine Wood, *Clinic Staffs Wrestle With Gag Order on Abortion*, L.A. TIMES, May 25, 1991, at B8 (stating that foregoing federal funds "means we're going to serve less people, and we're already turning people away"); Mimi Hall, *Pro-Choice Backers: Ruling Endangers Women's Lives*, USA TODAY, May 24, 1991, at A1 (advising that the loss of federal funds will lead to a cutback in AIDS and pregnancy prevention education). See also Kennedy, *supra* note 340.

348. The Title X requirement that the clinics be financially and physically separate "threatens their ability to . . . remain in operation at all." Brief of Amicus Curiae, Brief of The American Public Health Association, et. al. at 26, *Rust v. Sullivan* 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392) (citing Declaration of Raymond Fink, Chairperson of the Medical and Health Research Assoc. of N.Y. City, Inc. attached to Joint Appendix at 159, *Rust* (Nos. 89-1391, 89-1392)).

It is not disputed that some clinics provide abortions without Title X funds. These clinics would now be required to staff a different facility for their abortion related activities. See, e.g., Interview with Jeannine Michael on The MacNeil/Lehrer NewsHour

Title X funded programs are an important element of health care in low-income communities.<sup>349</sup> For many indigent women, Title X programs provide the only access to reproductive information or medical information in general.<sup>350</sup> The United States already suffers the reputation as lagging far behind the European communities in birth control.<sup>351</sup> Providing fewer opportunities for poor women to obtain birth control information will likely exacerbate an existing problem.

Some opponents of the new regulations suggest that Title X funded clinics provide services that reduce unwanted pregnancies and indirectly decrease the number of abortions.<sup>352</sup> If these clinics are forced to close their doors because of insufficient funding, then it follows that the number of unwanted pregnancies and, indirectly, abortions will increase, producing an opposite result of that intended by the new regulations.<sup>353</sup>

*Rust v. Sullivan* arguably results in a "two-tiered health care system."<sup>354</sup> Women who must rely on federally funded programs because of their indigence receive incomplete information while women who can afford private medical care generally receive complete information.<sup>355</sup> Again, the result contradicts the intent of Title X to provide "quality health care to poor women."<sup>356</sup>

From an administrative point of view, *Rust v. Sullivan* effectively defines the scope of the Title X ban on funding for abortions by upholding the new regulations.<sup>357</sup> The previous General Accounting Office finding that clinics were unsure of permissible activities<sup>358</sup> should now disappear. However, the Secretary may still be busy po-

---

(May 28, 1991) (transcript by Educational Broadcasting and GWETA), available in LEXIS, Nexis Library, Currnt File.

349. Forrest, *The Delivery of Family Planning Services in the United States*, 20 FAM. PLAN. PERSP. 91 (1988).

350. United States Dept. of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services*, at 9.4 (1981) attached to Joint Appendix at 70-71, *Rust v. Sullivan* 111 S. Ct. 1759 (Nos. 89-1391, 89-1392).

351. Philip Elmer-DeWitt, *Why Isn't Our Birth Control Better?*, TIME, Aug. 12, 1991 at 52. Elmer-DeWitt attributes the "sorry state of birth control in America" to an "inadequate range of options" and incomplete information. *Id.* at 52-53.

352. 137 CONG. REC. E1956 (daily ed. May 29, 1991) (statement of Rep. Don Edwards).

353. Kristine M. Gebbie, *A Personal Right That Cannot be Denied*, SEATTLE TIMES, July 17, 1991, at A9.

354. John H. Chafee, *Congress Should Remedy the Court's Decision: Withholding Information from Low-Income Pregnant Women Is Wrong*, WASH. POST, June 7, 1991, at A23; Martha Kuhlman, *Rust Ruling Endangers First Amendment*, LEGAL TIMES, August 5, 1991, at 34.

355. John H. Chafee, *Congress Should Remedy the Court's Decision*, WASH. POST, June 7, 1991, at A23.

356. *Id.*

357. See *supra* notes 36-43 and accompanying text.

358. See *supra* notes 28-32 and accompanying text.

licing the new requirements for receipt of Title X funds.<sup>359</sup> Clinics are already suggesting ways to circumvent the ban on abortion counseling and referral without giving up federal funds.<sup>360</sup>

### C. *Infringement on the Doctor-Patient Relationship*

Justice William O. Douglas announced thirty years ago that "the right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion."<sup>361</sup> The Rehnquist Court added a new caveat in *Rust v. Sullivan* by allowing the doctor to be silenced when his or her advice is politically incorrect.<sup>362</sup>

An important canon of medical ethics requires that a physician honor her patient's autonomy by giving the patient "complete and truthful information about her medical condition and any proposed treatment."<sup>363</sup> Because providing such information is necessary to enable the patient to make an informed decision about treatment, it must be presented without bias that could affect the patient's decision.<sup>364</sup> Abortion is a legal medical option to pregnancy,<sup>365</sup> that the decision in *Rust v. Sullivan* has effectively barred from presentation in the context of federally funded family planning clinics.<sup>366</sup>

Pregnancy can be unsafe when a number of medical conditions, such as diabetes, cancer, neurologic diseases and cardiovascular dis-

---

359. Dr. William Archer, deputy assistant secretary for population affairs of the Department of Health and Human Services, announced an intent to obtain compliance from clinics before cutting off federal funds. Joyce Price, *HHS Will Enforce Law On Abortion Counseling*, WASH. TIMES, May 30, 1991, at A3. Various pro-life groups announced their intent to assist the administration in policing the family planning clinics. *Id.*

360. Mimi Hall, *Some Clinics Take Money, Still Counsel About Abortion*, U.S.A. TODAY, May 28, 1991, at A2. A Kentucky clinic plans to "hand-off" pregnant clients to employees in the clinic who do not receive federal funds. *Id.*; Mimi Hall, *Clinics Side-step Counseling Ban*, U.S.A. TODAY, May 29, 1991, at A8.

361. See Nat Hentoff, *A Muzzle on Medicine*, WASH. POST, June 1, 1991, at A25 (quoting Justice William O. Douglas).

362. Walter Dellinger, *Conservatives Play Doctor*, N.Y. TIMES, May 25, 1991, at 23.

363. Amici Curiae Brief of the American College of Obstetricians and Gynecologists, et al. at 4-5, *Rust v. Sullivan* 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392) citing CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION 8.08 (1989)).

364. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *Making Health Care Decisions* 67-68 (1982) quoted in Amici Curiae Brief of the American College of Obstetricians and Gynecologists, et al. at 6, *Rust* (Nos. 89-1391, 89-1392).

365. See *Roe v. Wade*, 410 U.S. 413 (1973).

366. See *supra* notes 230-259 and accompanying text.

eases, exist.<sup>367</sup> If the Title X ban on abortion counseling and referral is applied literally in all cases then those high risk pregnant clients would be deprived of information about abortion where continuing the pregnancy could result in complications or loss of life.<sup>368</sup> However, the Court may have created a loophole in these situations. Justice Rehnquist stated that the regulations did not appear to bar advice about abortion when mandated by medical conditions because such advice would be outside the scope of family planning.<sup>369</sup> While this interpretation may not have been the intent of the Secretary,<sup>370</sup> it resolves the conflict between full disclosure and the Title X restriction in health- and life-threatening situations.

There is no loophole in the Title X ban on abortion counseling and referral in the event of an unwanted pregnancy. It is estimated that more than fifty percent of all pregnancies in the United States are unplanned.<sup>371</sup> Where the woman is unable to seek medical advice outside of a Title X clinic, she will receive a list of health care providers weighted in favor of those providers who promote child birth.<sup>372</sup> The regulations then result in a contradiction of established medical criteria for advising a woman in the event of an unwanted pregnancy.<sup>373</sup> Further, the ban on abortion counseling and referral may

---

367. Amici Curiae Brief of the American College of Obstetricians and Gynecologists, et al. at 7-8, *Rust v. Sullivan* (Nos. 89-1391, 89-1392).

The risks discussed include the following: A woman with diabetes has four times the chance of suffering hypertension, and increased risks of severe infection and complications. *Id.* (citing R. CREASY AND R. RESNICK, *MATERNAL FETAL MEDICINE* (2d ed. 1989)). Neurologic diseases, including multiple sclerosis, myasthenia gravis, post-polio-myelitis, epilepsy and some renal or sickle cell disease face "significant health risks." *Id.* (citing J. BUTLER & D. WALBERT, *ABORTION, MEDICINE, AND THE LAW* 253 (3d ed. 1986)). Women with cardiovascular disease, including "primary pulmonary hypertension or congenital heart disease," face a high risk of "major disability and death." *Id.* (citing *MANAGEMENT OF HIGH-RISK PREGNANCY* 289-90 (J. Queenan ed. 2d ed. 1985)). Pregnancy may mask the symptoms or worsen the condition for women with cancer. *Id.* (citing E. FRIEDMAN, D. ACKER & B. SACHS, *OBSTETRICAL DECISION MAKING* 62 (2d ed. 1987)).

368. See *supra* note 366 and accompanying text.

369. *Rust v. Sullivan*, 111 S. Ct. 1759, 1773 (1991). Cf. Nat Hentoff, *A Muzzle on Medicine*, WASH. POST, June 1, 1991, at A25 (interpreting the exception to the abortion counseling and referral ban to extend only to medical emergencies).

370. See *Rust*, 111 S. Ct. at 1786 n.6 (Blackmun, J., dissenting).

371. Philip Elmer-DeWitt, *Why Isn't Our Birth Control Better?*, TIME, August 12, 1991, at 52 (reporting that 3.4 million of the 6 million pregnancies each year are unplanned). An administrator at a Massachusetts family planning clinic estimates that 24 out of 25 pregnancies are unplanned. Carol Stocker, *The Front Lines of Family Planning*, BOSTON GLOBE, July 2, 1991, at 25 (Living).

372. See *supra* note 49 and accompanying text.

373. The American College of Obstetricians and Gynecologists requires that in the event of an unwanted pregnancy, the physician must advise the patient of all her options, including having the child, and either keeping the baby or placing the baby for adoption, or aborting. See Amici Curiae Brief of the American College of Obstetricians and Gynecologists, et al. at 9 (citing AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS STANDARDS FOR OBSTETRIC-GYNECOLOGIC SERVICE 61 (7th ed. 1989)). See, e.g., Transcript of ACLU Press Conference, Washington, D.C. (May 23, 1991) (discuss-

be at odds with at least thirty states that impose liability on a physician for not disclosing all of a patient's medical options.<sup>374</sup> The Title X regulations create, at a minimum, a context for confusion to the extent that they are inconsistent with medical ethic requirements<sup>375</sup> and state laws requiring full disclosure.<sup>376</sup>

Physicians are vocal in their opposition to the new regulations.<sup>377</sup> Implicit in the *Rust v. Sullivan* decision is the concept that although a physician may be restricted from providing certain advice, the doctor-patient relationship is unharmed.<sup>378</sup> The idea of full medical disclosure is a recent development in medical ethics,<sup>379</sup> is important for

---

ing *Rust v. Sullivan*, and participated in by Senators John Chafee (R-RI), Alan Cranston (D-CA), Ted Kennedy (D-MA), Brock Adams (D-WA), Representatives Henry Waxman (D-CA), Ron Wyden (D-OR), ACLU representatives Leslie Harris, Chief Executive Counsel, and Rachael Pine, and Planned Parenthood President Faye Wattleton), available in LEXIS, Nexis Library, Currnt File [hereinafter ACLU Press Conference].

374. These states include Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Brief for Petitioners at 32-33 n.58 and at Exhibit B, *Rust v. Sullivan* 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392) (citations omitted).

375. Martha Kuhlman, *Rust Ruling Endangers First Amendment*, LEGAL TIMES, August 5, 1991, at 34.

376. See *supra* note 373 and accompanying text.

377. Philip Elmer-DeWitt, *The Doctors Take On Bush*, TIME, August 5, 1991, at 52. The day after the *Rust v. Sullivan* ruling, the American College of Obstetricians and Gynecologists began forming a lobbying coalition that resulted in a force consisting of twenty-one health organizations with a membership of 425,000. *Id.*

See also *Telling The Doctor What Not to Say*, L.A. TIMES, July 1, 1991, at B4 (stating that the American Medical Association, without opposition, "condemned the *Rust* ruling" at the annual meeting); Bella English, *Gag Dangerous as a Precedent*, BOSTON GLOBE, July 10, 1991, at A17 ("nearly every major medical association has come out against the decision").

378. M. Gregg Bloche, *Mandating Medical Deceit*, WASH. POST, July 9, 1991, at A19. Dr. Bloche refers to Justice Rehnquist's statement in *Rust v. Sullivan* dismissing the possibility that a doctor's silence could be deemed misleading, since the clinics do not provide pregnancy care. *Id.* As a practical matter, this conclusion appears unsupported by fact or theory.

During a Senate hearing, a representative from the American Medical Association testified, "From a physician's perspective, the decision of the Supreme Court . . . undermines the underlying principles of the traditional doctor-patient relationship, including the right of unrestricted communication of information about treatment options available to patients." Martha Kuhlman, *Rust Endangers First Amendment*, LEGAL TIMES, August 5, 1991, at 34.

See also John H. Chafee, *Congress Should Remedy the Court's Decision: Withholding Information from Low-Income Pregnant Women is Wrong*, WASH. POST, June 7, 1991, at A23.

379. Brief of Twenty-Two Biomedical Ethicists as Amici Curiae at 8, *Rust v. Sulli-*



maintaining patient autonomy,<sup>380</sup> and is vital for supporting a doctor-patient relationship built on trust.<sup>381</sup> *Rust v. Sullivan* can be viewed as a "government [effort] to exploit the traditional trust of the physician-patient relationship in order to steer needy women's health care decisions in the direction of a medical treatment favored by the government."<sup>382</sup>

The Title X clients will be equally affected as a result of *Rust v. Sullivan*. The typical Title X client is poor, who generally depends exclusively on the government for medical care.<sup>383</sup> Some women who would choose abortion if it were presented as an option will now carry the baby to term or learn about the abortion option when the risk associated with abortion is increased.<sup>384</sup> For these women, the doctor-patient relationship will have failed. On the other hand, those women who would have elected abortion only because it was presented as a rational solution to an unwanted pregnancy will avoid the regrets and trauma associated with abortion.<sup>385</sup>

#### D. Impact on the Abortion Debate

Although the predominate issue in *Rust v. Sullivan* was not abortion, the decision fueled an already heated abortion debate. Pro-life activists believe that *Rust v. Sullivan* marks the eventual demise of the constitutional right to an abortion emanating from the 1973 decision in *Roe v. Wade*.<sup>386</sup> The objections of the pro-choice activists

---

van, 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392) (stating the "paternalistic approach has given way to an autonomy model").

380. *Id.* at 9-10.

381. See *Rust v. Sullivan* 111 S. Ct. 1759, 1785-86 (1991) (Blackmun, J., dissenting) stating:

In our society, the doctor/patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence . . . in the hands of medical professionals. One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.

See also M. Gregg Bloche, *Mandating Medical Deceit*, WASH. POST, July 9, 1991, at A19. Dr. Bloche argues that "muzzling the physician on reproductive matters threatens the entire relationship. Patients do not trust a doctor who 'tell[s] half-truths.'" *Id.*

382. Brief of Twenty-Two Biomedical Ethicists as Amici Curiae at 25, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Nos. 89-1391, 89-1392).

383. See *supra* notes 348-349 and accompanying text. See also Kristine M. Gebbie, *A Personal Right That Cannot Be Denied*, SEATTLE TIMES, July 17, 1991, at A9.

384. See, e.g., Comment of Senator Chafee in ACLU Press Conference, *supra* note 372.

385. Transcript of Congressional Pro-Life Caucus News Briefing, May 31, 1991, available in LEXIS, Nexis Library, Currnt File (comments by Dr. Camilla Hersh and Diane Solano, describing experience with patients considering abortion).

386. See, e.g., Linda Feldman, *Abortion Issue Moves to Congress*, CHRISTIAN SCIENCE MONITOR, May 28, 1991, at 6.

center on the impact on a woman's privacy rights and free speech<sup>387</sup>—but the opposition also centers on the fear that the road to overturning *Roe v. Wade* has become shorter.<sup>388</sup>

Perhaps Louisiana's strict abortion legislation best exemplifies the turn in the abortion road.<sup>389</sup> The Louisiana legislature overrode the governor's veto<sup>390</sup> to enact what was called "the strictest anti-abortion measure in the country."<sup>391</sup> Like most of the country,<sup>392</sup> Louisiana believed that the abortion legislation would pass muster with the current United States Supreme Court if the bill became the test of *Roe v. Wade*.<sup>393</sup> The Louisiana abortion bill reverts to the pre-*Roe v. Wade* days, when criminal penalties were imposed for the performance of abortions.<sup>394</sup> A federal judge declared the Louisiana abortion

387. *Id.* See also, Mimi Hall, *Ruling May Hurt Free Speech*, U.S.A. TODAY, May 29, 1991, at A8.

388. *Id.* See also David Broder, *Women's Caucus Draws New Energy From an Unexpected Source*, CHI. TRIB., July 18, 1991, at C27 (stating that "abortion rights are in greater jeopardy today than at any point since NWPC [National Women's Political Caucus] was in its infancy. Among the delegates, there was almost a sense of resignation that the Reagan-Bush appointees to the Supreme Court will soon reverse, or write limits onto the 1973 *Roe v. Wade* abortion-rights decision").

389. See generally Joyce Price, *Pro-Choice Forces Regroup*, WASH. TIMES, June 20, 1991, at A3. Other states that have recently enacted tougher abortion laws include Pennsylvania (requiring notification of the husband, a 24 hour waiting period and fetal development counseling), Utah (allowing abortion only where the fetus is gravely deformed or mother's health is jeopardized by pregnancy) and Guam (allowing abortion only where pregnancy imperils a woman's life). Tamar Lewin, *High Court has Several options for New Look at Abortion Right*, N.Y. TIMES, June 20, 1991, at A1. Alabama, Ohio, Michigan and North Carolina are advancing bills that would impact a woman's abortion decision. *Pro-Life Bills Gain in States: Louisiana Latest to Pass Limits on Abortion*, WASH. TIMES, June 19, 1991, at A3.

390. The override vote was decisive with the Louisiana Senate voting twenty-nine to nine in favor of override and the Louisiana House voting seventy-six to twenty-five in favor of override. The Hotline, June 19, 1991, available in LEXIS, Nexis Library, Currnt File.

391. See, e.g., J. Michael Kennedy, *Judge Sets Trial Date for Test of Louisiana Abortion Law*, L.A. TIMES, June 20, 1991, at A15, col. 1.

392. See, e.g., Dennis Duggin, *Freedom's Many Choices*, NEWSDAY, August 13, 1991, at 6 (stating that "the increasingly conservative Supreme Court has made it clear that it stands with the so-called pro-life crowd").

393. *Id.* There are several other bills further along in the appellate process than the Louisiana bill and which will likely reach the high court sooner. Pennsylvania, Utah and Guam have abortion bills that could also be the test case for *Roe v. Wade*. *Louisiana Abortion Law is Halted in U.S. Court*, N.Y. TIMES, August 8, 1991, at A16.

394. See *Excerpts from New Measure Limiting Louisiana Abortions*, N.Y. TIMES, June 21, 1991, at A11, col. 1. See George, *supra* note 150 at 435-45. States had statutes prohibiting abortion from as early as 1821. *Id.* at 435. Most states had an exception allowing abortion where the life of the mother was in jeopardy. *Id.* at 436. Various statutes imposed criminal penalties on doctors for the act of abortion or where the mother died as a result of the procedure, on women who sought abortions, and on the

legislation unconstitutional under *Roe v. Wade* clearing the way for an appeal to the Supreme Court<sup>395</sup> in a case that might be the right case to reconsider *Roe v. Wade*.<sup>396</sup>

There is a general belief that if the right case reaches the Supreme Court, *Roe v. Wade* will be overturned due to the conservative majority.<sup>397</sup> It is significant that Justice Souter cast the fifth and decisive vote in *Rust v. Sullivan*, giving the first indication on how he is inclined to decide on abortion.<sup>398</sup> It is of no small consequence that Justice Marshall announced his retirement shortly after the decision in *Rust v. Sullivan*.<sup>399</sup> His retirement opened another opportunity for the appointment of Justice Thomas, who will likely reflect the administration's anti-abortion views and perhaps ring the death knell for *Roe v. Wade*.<sup>400</sup>

### E. Political Fallout

At the heart of the *Rust v. Sullivan* decision is the Court's deference to Congress and administrative agencies.<sup>401</sup> This decision is one of many suggesting that the current court is willing to contain its own power in favor of empowering the other branches of govern-

---

facilities where the abortion was performed. *Id.* at 438-39. From 1968 until the decision in *Roe v. Wade*, some states began to allow abortion in cases of rape or incest, or where the fetus was seriously handicapped. *Id.* at 441-45.

The Louisiana bill allows abortion where the mother's life is at risk, or in cases of rape or incest if strict guidelines are met. N.Y. TIMES, June 21, 1991, at A11.

395. *Louisiana Abortion Law is Halted in the U.S. Court*, N.Y. TIMES, August 8, 1991, at A16.

396. "When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of *Roe v. Wade*, there will be time enough to reexamine *Roe*. And to do so carefully." Webster v. Reproductive Health Servs., 492 U.S. 490, 526 (O'Connor, J., concurring). In fact, it is believed that the Louisiana legislation was drafted to meet that criteria needed for the Court to reconsider *Roe v. Wade*. Eileen McNamara, *Abortion and Congress*, BOSTON GLOBE, June 20, 1991, at 1.

397. Miranda S. Spivack, *How States' Rights Can Rectify the Wrongs of the Supreme Court; Abortion: With Roe vs. Wade Facing Reversal, Feminists May Have to Resort to 50 Constitutions to Preserve It*, L.A. TIMES, June 16, 1991, at M2; Bruce Fein, *Shaky Future for Abortion Rights*, WASH. TIMES, June 4, 1991, at G4.

398. See generally Ruth Marcus, *Abortion-Advice Ban Upheld For Federally Funded Clinics*, WASH. POST, May 24, 1991, at A1 (noting that Souter "sid[ed] with four members of the court who are considered ready to vote to overturn . . . *Roe v. Wade*"). See also Linda Feldman, *Abortion Issue Moves to Congress*, CHRISTIAN SCIENCE MONITOR, May 28, 1991 at 6.

399. See, e.g., *How Far Right?*, NEWSWEEK, July 8, 1991, at 19.

400. At the time this note was written, Judge Clarence Thomas was the most recent nominee for the Supreme Court. It is believed that he will vote with Justices Rehnquist, White, Kennedy, and Scalia on abortion. See Donald Ayer, *Commentary: High Court Review*, RECORDER, August 8, 1991 at 4; *Marching to a Different Drummer*, TIME, July 15, 1991, at 18, 21.

401. See *supra* notes 205-228 and accompanying text. See also, Donald Ayer, *Commentary: High Court Review*, RECORDER, August 8, 1991, at 4.

ment.<sup>402</sup> It is therefore fitting that the question of federal funds for abortion counseling and referral should return to the Congress to resolve.<sup>403</sup>

In the wake of *Rust v. Sullivan*, the Senate and the House of Representative's Energy and Commerce Committee passed bills allowing federal funds to be used for abortion counseling and referral.<sup>404</sup> As generally predicted, the legislation was vetoed by the president.<sup>405</sup> Congress was unable to override the veto.<sup>406</sup> There is the added risk that in an effort to ensure an unambiguous intent, Congress will take the other extreme and mandate abortion counseling and referral.<sup>407</sup> Compelling speech on a subject raises the same First Amendment issues of free speech raised by the new regulations upheld in *Rust v. Sullivan*.<sup>408</sup>

The abortion issue has been called a "'Molotov cocktail . . . ready to explode.'" <sup>409</sup> The *Rust v. Sullivan* decision created added fallout,

402. Donald Ayer, *Commentary: High Court Review*, RECORDER, August 8, 1991, at 4.

403. See 137 CONG. REC. E1956 (daily ed. May 29, 1991) (statement of Hon. Don Edwards).

404. Renu Sehgal, *Bills Aim to Guard Right to Abortion*, BOSTON GLOBE, August 12, 1991, at 4. The full House passed a Labor, Health and Human Services bill that would prohibit the use of federal funds to enforce the ban on abortion counseling and referral. *Id.* Both the Senate and House defeated bills that would allow woman in the military to have an abortion at a federally funded military hospital. *Id.*

405. Both sides of the issue claimed enough votes to either sustain or override a veto. *E.g.*, Mary Deibel, *Senate Panel Defies Bush Veto Threat, Votes Against Abortion "Gag Rule"*, SEATTLE TIMES, July 12, 1991, at B1; Elaine S. Povich, *Senate OKs Bill Lifting "Gag Rule"*, CHI. TRIB., July 18, 1991, at M5. However, there was some indication earlier that President Bush was willing to review the administration's stand on the doctor-patient aspect of the ban on abortion counseling and referral. *See, e.g.*, Frank H. Murray & Joyce Price, *Bush Drops Hint of Shift Over Abortion*, WASH. TIMES, July 11, 1991, at A6. President Bush is quoted as stating: "We've got enough contentious items out there that divide this country, and I want to see the country come together. . . . But I am not going to change my fundamental position on this issue that to me is a very moral issue." *Id.*

406. William J. Eaton, *House Sustains Bush's Abortion Counseling Ban*, L.A. TIMES, Nov. 20, 1991 at A1.

407. Senator Chafee's original bill contained language that required that clinics counsel and make referrals on all options, including abortion. This was changed to make discussion of all options permissible. Helen Dewar, *Senate Indicates Backing for Abortion Counseling, Confusion on Parental Consent*, WASH. POST, July 17, 1991 at A8.

408. *See supra* notes 233-252, 304-317 and accompanying text.

409. *How Far Right?*, NEWSWEEK, July 8, 1991, at 19 (comments of Democratic pollster Harrison Hickman). NEWSWEEK opines that the Republican party is at risk of losing its younger voters over the abortion issue. *Id.* at 19-20. *See* David Broder, *Women's Caucus Draws New Energy from an Unexpected Source*, CHI. TRIB., July 18, 1991, at C27 (stating that Young Republicans at the National Women's Political Caucus agreed with the theory that the anti-abortion stand would loose the party votes).

particularly in the Republican Party.<sup>410</sup> Congress presented an avenue for the Administration to maintain its position on abortion and reverse its position on the new regulations.<sup>411</sup> The administration needed only to conclude that Congress intended the Title X ban on abortion to encompass conduct, not speech, and gracefully exit the quagmire.<sup>412</sup>

## VI. CONCLUSION

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>413</sup>

On the heels of the onslaught of criticism following *Rust v. Sullivan*, President Bush remarked that "[a]s a nation we must protect the unborn."<sup>414</sup> There is little argument with this sentiment. While the Supreme Court's decision in *Rust v. Sullivan* is a victory in the narrow context of protecting unborn life, it is a questionable attempt to answer "important questions of constitutional law."<sup>415</sup> The difficulty with the decision comes with allowing government to intrude in the protected realm of freedom of speech under the guise of federal funding and to change with relative ease a regulation with eighteen years of history.

*Rust v. Sullivan* teaches that congressional leaders cannot successfully blur their intent with ambiguous language. Congressional ambiguity opens the door to an administrative interpretation that need

---

410. Republicans who are anti-abortion are "uncomfortable with the gag rule." Elaine S. Povich, *Panel Votes to Lift Abortion "Gag Rule"*, CHI. TRIB., June 21, 1991, at C1 (comments of Rep. John Porter (R-Ill)).

California Democrat Representative Don Edwards has drafted with the assistance of Professor Laurence Tribe a Freedom of Choice Act that provides federal guidelines on abortion essentially along the lines of *Roe v. Wade*. Eileen McNamara, *Abortion and Congress; After Passage of Strict Louisiana Law, Focus Turns to a Nation Rights Bill*, BOSTON GLOBE, June 20, 1991, at A1. It is predicted that the Freedom of Choice Act will become an issue in the 1992 election. *Id.*

411. See Steve Holland, *White House Reviewing Ban on Abortion Counseling at Clinics*, REUTERS, July 9, 1991, available in LEXIS, Nexis Library, Currnt File (stating the White House was looking at the history of Title X to determine Congressional intent).

412. See *supra* notes 15-34 and accompanying text. See also *Reviewing the "Gag Rule"*, WASH. POST, July 10, 1991, at A20.

In a Harris poll commissioned by Planned Parenthood it was stated that seventy-eight percent of those polled opposed the decision in *Rust v. Sullivan*. Faye Wattleton, address to the National Press Club Luncheon, June 19, 1991 (transcript by Federal News Service), available in LEXIS, Nexis Library, Currnt File. A large majority believed the Title X restrictions on abortion counseling and referral to be "censorship of health information . . . violat[ing] free speech." *Id.*

413. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

414. Memorandum From President George Bush, August 17, 1991 (issued by the White House Office of the Press Secretary), available in LEXIS Nexis Library, Currnt File.

415. *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991) (Blackmun, J., dissenting).

only derive from a reasoned analysis to withstand judicial review.<sup>416</sup> Where Congress and the Administration are on different sides of an issue, the expected results are typified by the litigation leading up to *Rust v. Sullivan*, and the embittered subsequent activity.

There is a difference between government interference with a protected activity and government encouragement of an alternate activity.<sup>417</sup> Where the latter may be constitutionally protected, the former is not.<sup>418</sup> Encroachment of First Amendment rights is an improper weapon regardless of where one's sentiments lie in the abortion battle.

LOYE M. BARTON

---

416. *Id.* at 1767-69.

417. *Maher v. Roe*, 432 U.S. 464, 475-76 (1973).

418. See *Perry v. Sindermann*, 408 U.S. 593 (1972). The *Perry* Court stated:

[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'

*Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

